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Supreme Court, U.S.
FILED

No. 97 1052 DEC 17 1997

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1997

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BRAHIM ARRIEH--- PETITIONER

VS.

CITY OF MILWAUKEE ---RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CIRCUIT COURT OF APPEALS OF THE STATE
OF WISCONSIN

# PETITION FOR WRIT OF CERTIORARI

BRAHIM ARRIEH
620 North 26th Street, #2
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(414)933-7686

16 pp

## QUESTIONS PRESENTED

Petitioner received due notice and a hearing under the Fifth Amendment of the United States of Constitution on the closing and sale of his property, but the City of Milwaukee failed to give him due notice of the specific controlled drug buys that they conducted on his property.

1. Did the failure of the City of Milwaukee to give the Petitioner specific information of controlled drug buys that they conducted, so that he could take appropiate measures to abate the drug nuisance, violate the due process provision of the Fifth Amendment of the United States Constitution ? Answer: Yes.

The trial court ordered the closing and sale of the Petitioner's property, valued at $136,500., his residence for over 60 years, who abated the only drug incident he learned about, for allegedly failing to abate other drug incidents about which he knew nothing.

2. Was the taking of the Petitioners property a violation of the "excessive fines" clause of the Fifth Amendment to the United States Constitution? Answer: Yes.

## LIST OF PARTIES

**All parties appear inthe caption of the case on the cover page.**

## TABLE OF CONTENTS

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....3

STATEMENT OF THE CASE.....4

ARGUMENTS..... 9

REASONS FOR GRANTING THE WRIT.....11

CONCLUSION.....11

## INDEX TO APPENDIX

APPENDIX A Decision of the State Court of Appeals

APPENDIX B Decision of the Supreme Court Denying Review

APPENDIX C Decision of the State Court

APPENDIX D Decision of the State Court of Appeals

APPENDIX E Decision of the Trial Court

APPENDIX F Decision of the Court of Appeals

APPENDIX G Decision of the Trial Court

## TABLE OF AUTHORITIES CITED

CASES

Alexander v. United States, 113 S. Ct. 2766, 125 L.ED.2d at 455 (1993).

Austin v. United States, 113, S. Ct. 2801, 125 L.ED.2d at 497 (1993).

United States v. Real Property, 845 F. Supp. 725 (C.D.Cal.1994).

STATUTES

Wisconsin Statutes Section 823.113

Wisconsin Statutes Section 823.114

Wisconsin Statutes Section 823.115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ x ] For cases from **state courts:**

The opinion of the Court of Appeals appears at Appendix A to the petition and is

[ x ] reported at Wis. Ct. Appeals, No. 960482 (1997) ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[ x ] For cases from **state courts:**

The date on which the highest state court decided my case was October 31, 1995. A copy of that decision appears at Appendix A.

[ x ] A timely petition for review was therafter denied on the following date: September 18,1997, and a copy of the order denying review appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### UNITED STATES CONSTITUTION

**AMENDMENT ARTICLE V**

**No person shall... be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compenstation.**

**AMENDMENT ARTICLE VIII**

**Excessive bail shall not be required, nor excessive fines imposed and unusual punishment inflicted.**

## STATEMENT OF THE CASE

This case is an appeal by writ of certioraru from the decision of the Circuit Court of Appeals District 1 of the State of Wisconsin that the "excessive fines" clause of the Eighth Amendment of the U.S. Constitution did not apply to the present case, a nuisance abatement action.

In June, 1990, the petitioner, Brahim Arrieh, lived at 620 North 26th Street, Milwaukee, Wisconsin, a 12-Unit apartment building that he owned. He was born there in 1930, became the owner of the building in 1977 when he inherited his share of the property from his father and bought the remaining shares in the property from relatives (R. 33:13).

Under the new WDHAL on June 6, 1990, the Milwaukee Police department conducted its first controlled buy of drugs at Arrieh's apartment building. (R. 32:1).[1] The buy was made by a confidential informant. No arrest was made and Arrieh was not notified of this transaction.

On July 16, 1990 the Police Department served Arrieh with a letter notifying him of unspecified drug activity in his apartment building. The letter provided no notice of the type of drug activity alleged or which tenant or apartment unit was. involved (R.32:2). On the following day Arrieh went to the Police Department to get information about the drug activity referred to in the letter. He was referred to a written police report that contained no additional specific information. (R. 33:19-20). According to Milwaukee Police Detective Glen Zirgibel, on that sameday he received a phone call from Arrieh and

informed him only that there was a drug problem in Apartment 1, and that police would be monitoring the situation and if there were further problems he would hear from him again. (R. 35:55). Detective Zirgibel never contacted Arrieh again to advise that there were any further problems besides the tenant in Apartment 1

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[1] Record item number 32 is an envelope containing all trial exhibits. References in this statement are to the trial exhibit number of the documents contained in item 32 of the appellate record.

On July 18, 1990 the police conducted a second controlled buy at Arrieh's apartment building, again using a confidential informer. (R. 32:4) No arrest was made and no report was made to Arrieh. On July 22, 1990, police conducted a third controlled buy, again using a confidential informer. No arrest was made, and again, no one contacted Arrieh.

On July 23, 1990 Arrieh received a second letter, notifying him of unspecified drug activity in his apartment building. (R. 32:7). No specific details were provided to permit him to identify the guilty tenant or to enable him to begin on eviction proceedings against any specific tenant. There was no follow up call from Detective Zirgibel to provide any further details as to where the problem continued.

Instead, the following day police executed a search warrant for Apartment 1, found no drugs, but seized drug paraphernalia. (R. 33:48-51: R.32:8). No one informed Arrieh of the search and, contrary to the assertion in the City's brief, at p.23, the occupant, William Wells was not arrested. (See, R. 32;8, indicating "no case" resulted from the search).

In late August, 1990, a neighbor reported to Arrieh that he observed greater that usual activity of persons entering and leaving Apartment 1, occupied by William Wells. On August 25, 1990, Arrieh gave a written notice to Mr. Wells to vacate the apartment for maintaining a nuisance by permitting a large number of people to enter leave his apartment. However, the activity quited down and there were no further complaints from neighbors, so Arrieh, lacking any knowledge of the earlier police contact with Wells, abandoned his effort to evict the tenant. (R.33:88).

On August 28, 1990 police arrested tenant Edgar Watson when he was observed outside Arrieh's building apparently involved in drug activity. When approached by police he ran into the building and was there after arrested (R.32:14). The police did not report the arrest to Arrieh, who personally had no knowledge of Watson's drug activity.

On September 4 and 5, 1990 police made two more secret controlled buys from Apartment 4 at Arrieh's apartment building, again using a confidential informer. (R. 32:17-18). Once again, no arrest was made and no one informed him that the problem now appeared to have switched from Apartment 1 to Apartment 4.

On October 26, 1990 the Police Department executed a search warrant and finally arrested tenant William Wells in Apartment 1 for drug activity. (R. 32 :23). Again, the police did not report the arrest to Arrieh, but he made his own inquiry and learned that the tenant had been arrested for drug activity. On November 5, 1990 Arrieh gave a 10 day written notice to the tenant to vacate his apartment for maintaining a nuisance and about November 17, 1990 the tenant vacated the apartment. (R. 33:89).[2]

On November 19, 1990 Arrieh sold the building on a land contract for $136,500.00, at which nine apartments were rented and applications for the two vacant apartements were given to the buyer. During the summer $40,000 had been spent in renovating the building and it was in good condition at the time of the sale.

On November 27, 1990 Arrieh was served with the summons and complaint in this case. (R. 1). He was not in control of the apartment building at that time (R. 33 :92-93). In April, 1991 the land contract vendee defaulted, and on May 1, 1991, when Arrieh regained possession, there were only two tenants left in the building (excluding the caretaker). (R. 33:91) . Several apartments had been had been extensively damaged by tenants evicted by the land contract vendee, and the damage was repaired during the next several months at the cost $12,000.00.

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[2] The law did not at that time provide landlords with specific authority to evict a tenant upon suspicion of drug activity, but fortunately, Wells did not contest Arrieh's efforts. Section 704.17(1)(a), Wis. Stats., enacted four years later, now provides landlords with such authority.

From May 1, 1991, when he regained control of the apartment building, until the bench trial of this case on August 23, 1991, police secretly made six more drug buys using confidential police informers. (R. 32:38, 39, 40, 41, 42, 43). Arrieh testified that he never observed any of the drug buys, and he was never made aware of them by police as had been promised by Detective Zirgibel the prior summer. (R.33:40, 149, 151).

The police sought no search warrants and made no arrests as a result of the six controlled buys during the four months preceding the trial. Three of the six buys in the Summer of 1991 occurred within the three week period immediately preceding the trial of this case. Since no arrests or search warrants resulted from any of these controlled buys were made for the sole reason of strengthening the City's case that the building was a nuisance.[3] Meanwhile, as the nuisance trial in this case proceeded, the offending perpetrators were permitted to continue their illegal drug trade uninhibited by further police action.

Following the bench trial, Judge Wasielewski found the building to be a nuisance under sec. 823.113. He ordered it closed and sold, with proceeds distributed pursuant to sec. 823.114 and 823.115. The property has been closed and placarded since September 15, 1991.

Arrieh, and his father before him, have occupied and paid taxes on the property since 1927, about 70 years. He was born in the property in 1930 still lives in

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[3] See also, R. 34:76-78, 81, in which Detective Zirgibel testified that his job in arranging these controlled buys was simply to monitor drug activity in the building. He admitted that after acquiring knowledge of drug activity in the building during the trial by the very same William Wells previously arrested by police and evicted by Arrieh, he did not notify any superiors in the police department or contact the probation department to determine if the known suspects were in violating probation by engaging in illegal activity. The only action he would take was to enter the controlled buy in a Vice Control day book which contained all drug activity city-wide.

his property alone, pending the outcome of his litigation. Since the trial court ordered closure of the property over 6 years ago, he has been deprived of any rental income, at a loss approaching $240,000.00. He continues to pay taxes of approximately $4,000.00 a year to the City of Milwaukee.

After the judgment was entered in this case in the Trial Court, the defendant Arrieh filed a timely appeal to the Wisconsin Court of appeals. Subsequently, Arrieh filed a motion in the Trial Court to reopen the judgment to raise the question of the Constitutionality of the new drug house law. Thereafter the Court of Appeals granted a stay of its proceedings, pending the hearing of Arrieh's motion. After the hearing on Arrieh's motion, with the decision that was adverse to him, the appeal to the Court of Appeal's was resumed.

## ARGUMENT

### I- THE FAILURE OF THE CITY OF MILWAUKEE TO GIVE ARRIEH PROPER NOTICE OF THE CONTROLLED DRUG BUYS IS A VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The City of Milwaukee contended that due notice and a hearing was given on his alledged violation of the Wisconsin Drug House Law (WHDAL) Wis.Sts.113, that resulted in the order for the closing and sale of his property. Wis. Sts. 114.

Under WDHAL Arrieh was requested to abatement the nuisance of drug activity in his property. He did abate the one instance of drug activity that he learned about. He did not abate later drug activity since he neither observed nor was he informed about them, although City of Milwaukee Detective Zirgibel promised that he would notify Arrieh if any further drug activity occurred. No further notification was ever received from him by Arrieh.

Arrieh demonstrated that he was ready, willing and able to abate any drug activity on his property, by first notifying the suspected tenant in apartment 1 on the mere suspiscion that he was engaged in drug activity, to cease greater than usual number of persons frequenting his apartment, and by later actually evicting him upon learning of his arrest for drug activity.

Arrieh was ready, willing and able to evict any other tenant for drug activity, if and when he either observed such activity or he learned about it from any authority or any other source, which he did not.

Being concerned about possible drug activity, he took several measures to guard against such activity by beginning the installation of a new security system, keeping the front and rear doors securely locked and placing dead bolt locks on all apartment doors.

There is no question that Arrieh would have evicted any tenant upon notification by the police identifying the one engaged in drug activity. Perversely, the police, conducted several drug buys in Arrieh's apartment building, and kept them a secret from him.

Nor was it unrealistic that Arrieh, did not observe or learn of the drug activity himself since it was always in secret and very sporadic.

Arrieh should not be subject to the loss of his property, his home for 60 years, under the circumstances detailed above in this case.

## II- THE DECISIONS FOR THE FORFEITURE OF ARRIEH 'S PROPERTY UNDER WDHAL IS A VIOLATION OF THE "EXCESSIVE FINES" PROVISION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In the decision of the first Court of Appeals case the three judges concurred that the taking of Arrieh's property under WDHAL was subject to the "excessive fines" provision of the Eighth Amendment of the United States Constitution and remanded the case to the Trial Court to determine and apply in "excessive fines" test. Alexander v. United States, 113 S. Ct. 2766, 125 L.ED.2d at 455 (1993) whether "in cash or in kind." Austin v. United States, 113 S.Ct. 2801, 125 L.Ed.2d at 497 (1993).

On remand the Trial Court selected a test from United States v. Real Property at 6625 Zumeriz Drive, 845 F. Supp. 725 (C.D.Cal.1994), and decided that the taking of the Arrieh property was an "excessive fine", and it ordered the closure and sale order of the initial Trial Court rescinded.

The City of Milwaukee appealed this decision and the Court of Appeals reversed it. The principal reason, given by the Court of Appeals, was that the "excessive fines" clause of the Eighth Amendment did not apply to a forfeiture in a drug nuisance case. This is directly contrary to the decision this same Court of Appeals reached the first time it heard this case on appeal. The court took the view that WDHAL was solely a remedial law and did not involve

punishment. This again is directly contrary to its earlier decision where it ruled that the Austin case applied and remanded the case to the Trial Court for its determination.

## REASONS FOR GRANTING THE PETITION

1. The second Wisconsin Court of Appeals decision is in conflict with the first Wisconsin Court of Appeals decision regarding the applicability of the "excessive fines" clause of the Eighth Amendment to the United States Constitution.

2. The second Wisconsin Court of Appeals decision is in conflict with the United States Supreme Court decision in Austin v. United States 113 S. Ct, 2801(1993).

3. There is an important question of federal law that has not been, but should be settled by this Court, whether the new drug house statutes, such as Wisconsin Drug House Law are constitutional sound.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Date: December 15, 1997

(2) No.

97 1052 DEC 17 1997

OFFICE OF THE CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1997

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BRAHIM ARRIEH--- PETITIONER

VS.

CITY OF MILWAUKEE ---RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE STATE OF WISCONSIN

# PETITION FOR WRIT OF CERTIORARI

## APPENDIX

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95 pp

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**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

May 20, 1997

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-0482**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**CITY OF MILWAUKEE,**

**PLAINTIFF-APPELLANT,**

**STATE OF WISCONSIN,**

**INTERVENOR,**

**V.**

**BRAHIM ARRIEH,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Reversed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

FINE, J. The City of Milwaukee appeals from an order entered by the trial court rescinding a previously entered order for closure and sale under the Drug House Abatement Law, §§ 823.113 *et seq.*, STATS., of an apartment building owned by Brahim Arrieh. The trial court concluded that the closure and sale violated Arrieh's Eighth-Amendment right to be free from "excessive fines." The question presented by this appeal is whether the Excessive Fines Clause prevents the confiscation or destruction of property to abate or remediate a nuisance. We conclude that it does not. We reverse.

## I.

Wisconsin's Drug Abatement Law declares to be a nuisance "a[ny] building or structure that is used to facilitate the delivery, distribution or manufacture . . . of a controlled substance . . . and any building or structure where those acts take place." Section 823.113(1), STATS. The law permits a city where the nuisance is located to "maintain an action in the circuit court to abate the nuisance and to perpetually enjoin every person guilty of creating or maintaining the nuisance, the owner, lessee or tenant of the building or structure where the nuisance exists and the owner of the land upon which the building or structure is located, from continuing, maintaining or permitting the nuisance." Section 823.113(2), STATS. If the circuit court finds that "the existence of the nuisance is established . . ., an order of abatement shall be entered as part of the judgment in the case." Section 823.114(1), STATS. Under this provision, the order of abatement "shall do all of the following:"

> (a) Direct the removal from the building or structure of all furniture, equipment and other personal property used in the nuisance.
>
> (b) Order the sale of the personal property.
>
> (c) Order the closure of the building or structure for any purpose.

> (d) Order the closure of the building or structure until all building code violations are corrected and a new certificate of occupancy is issued if required by the city, town or village within which the property is located and the building or structure is released under s. 823.15 or sold under s. 823.115.
>
> (e) Order the sale of the building or structure and the land upon which it is located or, if the requirements under s. 66.05 (1m) (b) [66.05 (1) (b)] are met, order that the building or structure be razed, the land sold and the expense of the razing collected under s. 823.06.

***Ibid.*** "The owner of any building or structure, or the owner of the land upon which the building or structure is located" that is subject to an abatement order under the Drug House Abatement Law is not without a remedy to save his or her investment and may "file an undertaking in a sum and with the sureties required by the court to the effect that he or she will immediately abate the alleged nuisance, if it exists, and prevent the same from being reestablished in the building or structure, and will pay all costs that may be awarded against him or her in the action." Section 823.15, STATS. This section further provides:

> Upon receipt of the undertaking, the court may dismiss the action as to the building or structure and revoke any order previously made closing the building or structure; but that dismissal and revocation shall not release the property from any judgment, lien, penalty, or liability that the property is subject to by law. The court has discretion in accepting any undertaking, the sum, supervision, satisfaction, and all other conditions of the

> undertaking, but the period that the undertaking shall run may not be less than one year.

***Ibid.***

On November 27, 1990, the City of Milwaukee commenced an abatement action against Arrieh alleging that he owned an apartment building in which there was drug activity and that, although two formal notices to abate that activity were served on him, the building "has continued to be used to facilitate the delivery of a controlled substance," and that, therefore, the building was "a public nuisance pursuant to sec. 823.113, Stats."[1]

The trial court held a hearing on the City's complaint. Arrieh and a narcotics detective with the Milwaukee Police Department testified. At the conclusion of the hearing, the trial court found "that the building is one used to facilitate the delivery of controlled substances" and that, accordingly, the building was a

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[1]The first notice was dated July 13, 1990, and gave to Arrieh "5 working days to abate the nuisance." The notice further explained: "This means that you must take all means necessary to assure that the sale and or manufacture of illegal drugs at the above address ceases completely." The notice further explained the consequences of a failure to abate:

> Unless you abate the nuisance immediately, the property at the above location may be declared a public nuisance by a court of competent jurisdiction.
>
> If the court declares the above property a nuisance it may be ordered under state statutes S 823.113, that all personal property be removed and sold, also order the closure of the building for any purpose.
>
> Further, all person(s) residing on the premises may be required to vacate the property, and the property could be ordered razed and/or sold. This includes all the land upon which the structure is located.

The second notice was dated July 23, 1990, and alleged that there were "[f]urther citizen/police drug complaints" and "[o]n-going drug activity as detected by the Drug Abatement Team and/or building code violations."

nuisance under the Drug House Abatement Law. The trial court did not enter an immediate order or closure, but, rather, adjourned the hearing to take additional testimony concerning the factors enumerated in § 823.113(4), STATS. [2]

Following this second hearing, at which Arrieh, the police detective who testified at the first hearing, and a City of Milwaukee building inspector testified, the trial court found that there was substantial drug activity at the apartment building and that, therefore, the building was a nuisance subject to abatement. The trial court ordered the building closed to all except Arrieh "and his agents and workmen who are on the premises performing work as ordered by the building inspector." The trial court also directed Arrieh "to serve tenancy termination notices" on the building's tenants. The trial court did not, however, order the property sold, but, rather, gave Arrieh an opportunity to post an undertaking under § 823.15, STATS. Arrieh offered an undertaking of $2,000, which the trial court rejected. After finding that Arrieh knew that his building was being used for the sale of drugs and

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[2] Section 823.113(4), STATS., provides:

In ruling upon a request for closure, whether for a defined or undefined duration, the court shall consider all of the following factors:

> (a) The extent and duration of the nuisance at the time of the request.
>
> (b) Prior efforts by the defendant to comply with previous court orders to abate the nuisance.
>
> (c) The nature and extent of any effect that the nuisance has upon other persons, such as residents or businesses.
>
> (d) The effect of granting the request upon any resident or occupant of the premises who is not named in the action, including the availability of alternative housing or relocation assistance, the pendency of any action to evict a resident or occupant and any evidence of participation by a resident or occupant in the nuisance activity.

did not make good-faith efforts to rectify the situation, the trial court ordered that the building be sold.[3]

Arrieh challenged the constitutionality of the Drug House Abatement Law, which the trial court rejected. In an unpublished opinion, ***City of Milwaukee v. Brahim Arrieh***, No. 91-2628, unpublished slip op. (Wis. Ct. App. Sept. 27, 1994), we affirmed in part and reversed in part. The panel agreed unanimously that Arrieh's challenges to the Drug House Abatement Law on vagueness and due-process grounds were without merit, and remanded the case to the trial court to consider whether closure and sale of the apartment building violated the Eighth Amendment's prohibition against excessive fines. ***Ibid.***[4] The trial court, a new judge presiding, concluded that closure and sale of the apartment building violated Arrieh's Eighth-Amendment rights.[5]

## II.

The Eighth Amendment prohibits the imposition by government of "excessive fines." ***See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.***, 492 U.S. 257, 264 (1989).[6] Although the United States Supreme Court has never held that the Excessive Fines

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[3] The trial court described Arrieh's efforts to abate the drug problem as being "made only grudgingly and only with the threat of closure hanging" over his head, and characterized those efforts as "too little too late."

[4] One member of the panel joined in the concurring opinion written by the author of this opinion. The author of this opinion and the other judge did not join in the lead opinion. Thus, as we noted in that concurrence, relying on ***State v. Dowe***, 120 Wis.2d 192, 194, 352 N.W.2d 660, 662 (1984), the concurring opinion was the opinion for the court. ***See City of Milwaukee v. Brahim Arrieh***, No. 91-2628, concurring op. at 8 (Wis. Ct. App. Sept. 27, 1994) (Fine, J., concurring).

[5] In its lengthy written decision, the trial court relied extensively on the minority opinion in our earlier decision in ***City of Milwaukee v. Brahim Arrieh***, mischaracterizing it as the opinion of the "Court of Appeals." See footnote 4, above.

[6] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Clause applies to States through the Fourteenth Amendment, *see id.*, 492 U.S. at 276 n.22 (declining to decide issue); ***Pueblo School Dist. No. 70 v. Toth***, 924 P.2d 1094, 1099 (Colo. App. 1996) ("The excessive fines clause of the Eighth Amendment has not been held specifically applicable to the states by virtue of the Fourteenth Amendment's due process clause."), we assume that it does.[7] *See* ***City of Milwaukee v. Kilgore***, 193 Wis.2d 168, 190, 532 N.W.2d 690, 698 (1995) (assuming, without discussion, that the Eighth Amendment's prohibition against "excessive fines" applies to state-court proceedings). Moreover, imposition of "excessive fines" is prohibited by Article I, § 6 of the Wisconsin Constitution.[8]

"Statutes are presumed to be constitutional. Every presumption must be indulged to sustain the constitutionality of a statute, and if doubt exists, it must be resolved in favor of constitutionality." ***Kilgore***, 193 Wis.2d at 188, 532 N.W.2d at 697. (Internal citations omitted.) The Excessive Fines Clause of the Eighth Amendment applies only to "punishment" that is imposed by government "'for some offense.'" ***Austin v. United States***, 509 U.S.

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[7] The "cruel and unusual" component of the Eighth Amendment applies to the states through the Fourteenth Amendment. ***Robinson v. California***, 370 U.S. 660, 666-667 (1962). Additionally, the Supreme Court assumed, without deciding, that the "excessive bail" provision also applies to the states. *See* ***Schilb v. Kuebel***, 404 U.S. 357, 365 (1971) (*dictum*).

[8] Arrieh does not rely on or even cite Article I, § 6 of the Wisconsin Constitution. This provision reads:

> Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishment inflicted.

Given the mirror-image wording of the Eighth Amendment and Article I, § 6, and in the absence of any reason to interpret the two clauses differently, we assume that the result of this case would be the same if it were decided under the Wisconsin Constitution. *See* ***City of Milwaukee v. Kilgore***, 193 Wis.2d 168, 190, 532 N.W.2d 690, 698 (1995) (assuming, without discussion, that the two clauses are congruent); ***Pueblo School Dist. No. 70 v. Toth***, 924 P.2d 1094, 1099 (Colo. App. 1996) (construing the "excessive fines" clause of the Colorado Constitution consistent with authority construing the Excessive Fines Clause of the Eighth Amendment).

602, 609-610 (1993) (citation omitted); *see also* ***Alexander v. United States***, 509 U.S. 544, 557 (1993). Accordingly, the Eighth Amendment is not implicated by a forfeiture unless that forfeiture is "punishment" for an "offense." ***Austin***, 509 U.S. at 622.[9]

Although the abatement of any nuisance adversely affects the owner of the property found to be subject to abatement, that fact has never been considered to be "punishment" and has never triggered an "excessive fines" analysis. *See* ***Bennis v. Michigan***, 516 U.S. ___, ___, 116 S. Ct. 994, 1001, 134 L.Ed.2d 68, 78-79 (1996) (abatement of nuisance does not violate either Due Process Clause of Fourteenth Amendment or the Takings Clause of Fifth Amendment made applicable to the states by the Fourteenth Amendment even though abatement adversely affects innocent owner); ***J. W. Goldsmith, Jr.-Grant Co. v. United States***, 254 U.S. 505, 513 (1921) (Excessive Fines Clause of the Eighth Amendment not discussed when innocent person's interest in property was forfeited even though the forfeiture was imposed by the United States) (forfeiture of innocent person's interest in property held not to violate due process: "It is the illegal use that is the material consideration,–it is that which works the forfeiture, the guilt or innocence of its owner being accidental."). Thus, ***Miller V. Schoene***, 276 U.S. 272 (1928), upheld the forced destruction of cedar trees to protect nearby apple orchards, without compensation for either the damage or the diminished value. ***Id.*** at 281. Writing for a unanimous court, then Justice Harlan Fiske Stone expressed the canon:

> And where the public interest in involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

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[9] Significantly, the statutes in *Austin* made the owner's innocence a defense to the forfeiture. *Austin v. United States*, 509 U.S. 602, 605 n.1 (1993).

*Id.*, 276 U.S. at 279-280. *See also Lucas V. So. Carolina Coastal Council*, 505 U.S. 1003, 1022 (1992) ("[M]any of our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."); *Just v. Marinette County*, 56 Wis.2d 7, 16, 201 N.W.2d 761, 767 (1972) (recognizing distinction between the taking of property for the public good, for which compensation is required, and the taking of property to prevent a public harm, for which compensation is not required); *Boden v. City of Milwaukee*, 8 Wis.2d 318, 328-329, 99 N.W.2d 156, 162 (1959) (police power extends to "abatement or condemnation" of property without compensation if necessary to prevent harm to public); *Miller v. Foster*, 244 Wis. 99, 103, 11 N.W.2d 674, 676 (1943) ("property may be destroyed to protect the public welfare when such property becomes a nuisance or dangerous to public safety"); *Building Height Cases*, 181 Wis. 519, 523, 195 N.W. 544, 546 (1923) (recognizing that police power "has been exercised to authorize the destruction of buildings without compensation to prevent the spread of conflagration"); *see, e.g.*, § 66.05, STATS. (permitting razing without compensation buildings that have deteriorated to point of becoming public nuisances). We, like the Court in *Bennis*, 516 U.S. at ___, 116 S. Ct. at 1001, 134 L.Ed.2d at 79, decline to veer from principles so firmly rooted in our jurisprudence.[10]

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[10] The trial court and the minority in our earlier decision relied on land-use and takings cases to support their contention that the Excessive Fines Clause of the Eighth Amendment applies to the forced abatement of nuisances. *See City of Milwaukee v. Brahim Arrieh*, No. 91-2628, unpublished slip op. at 44-51 (Wis. Ct. App. Sept. 27, 1994) (Schudson, J). Those cases are inapplicable. For example, the second prong of the land-use analysis in determining whether there is a "taking"--namely, whether the regulation denies the owner an "economically viable use of his land," *Nolan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *see also Dolan v. City of Tigard*, 512 U.S. 374, ___, 114 S. Ct. 2309, 2316, 129 L.Ed.2d 304, 316 (1994); *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1016 n.6 (1992)--is inapplicable to nuisance abatement cases, where the deprivation is obvious; *Just v. Marinette County*, 56 Wis.2d 7, 16, 201 N.W.2d 761, 767 (1972) (recognizing distinction between the taking of property for the public good, for which compensation is required, and the taking of property to prevent a public harm, for which compensation is not required). *See also Lucas*, 505 U.S. at 1022 (recognizing the distinction between land-use regulation and nuisance abatement: "many of our prior opinions have suggested that 'harmful or noxious uses' of property may be

A property owner's innocence is not a defense under the Drug House Abatement Law; the owner of property found to be a nuisance under the Drug House Abatement Law must abate the nuisance irrespective of whether he or she has committed an "offense." There is thus no "punishment" to trigger the Excessive Fines Clause of the Eighth Amendment, *cf.* ***J.W. Goldsmith, Jr.-Grant Co.***, 254 U.S. at 513 ("It is the illegal use that is the material consideration,--it is that which works the forfeiture, the guilt or innocence of its owner being accidental.") (due-process analysis), even though the closure and sale may deter other property owners from letting their buildings become nuisances, *see* ***Bennis***, 516 U.S. at ___, 116 S. Ct. at 1000, 134 L.Ed.2d at 78 (recognizing that deterrence element does not make forfeiture "punishment"). Either the owner abates the nuisance or the property is sold to someone who will. *See* § 823.114(1), STATS. Abatement of the nuisance by the property's owner prevents the property from being closed and sold, § 823.15, STATS. (owner may file an undertaking "to the effect that he or she will immediately abate the alleged nuisance"), and the circuit court may consider an owner's good-faith efforts to abate the nuisance in determining whether closure is warranted, § 823.113(4), STATS. The Eighth Amendment is not applicable here. The order of the trial court rescinding the order entered for the closure and sale of Arrieh's apartment building is reversed.

*By the Court.* Order reversed.

Publication in the official reports is recommended.

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proscribed by government regulation without the requirement of compensation"). By the same token, the appropriate test of whether a nuisance-abatement scheme passes constitutional muster is not the substantially-advance-legitimate-state-interest burden applicable to land-use regulations, *see* ***Dolan***, 512 U.S. at ___, 114 S. Ct. at 2316, 129 L.Ed.2d at 316; ***Nollan***, 483 U.S. at 834, but, rather, whether the legislature's choice, where "unavoidable," is not "unreasonable." ***Miller v. Schoene***, 276 U.S. 272, 280 (1928). Given the forays of destruction that flow from drug-house beachheads, we do not believe that the Drug House Abatement Law is an "unreasonable" legislative response.

**Office of the Clerk**
# SUPREME COURT

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To:

September 18, 1997

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You are hereby notified that the Court has entered the following order:

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No. 96-0482 City of Milwaukee, State of Wis. v. Arrieh LC#90CV015879

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-respondent-petitioner, Brahim Arrieh, and is considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Abrahamson, C.J., dissents.

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*Marilyn L. Graves*
*Clerk of Supreme Court*

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
Branch 34

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CITY OF MILWAUKEE,

Plaintiff,

-vs- Case No. 90-CV-015879

BRAHIM ARRIEH, MEMORANDUM DECISION

Defendant.

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**Procedural Background**

This case originally arose in 1990 as the second application of then brand-new Wisconsin Drug House Abatement Law (WDHAL), secs. 823.113, 823.114, 823.115, and 823.15, Wis. Stats. The City of Milwaukee sought to seize and sell defendant Brahim Arrieh's apartment building, alleging under the new law that Arrieh had failed to abate the nuisance of drug dealing in the apartment building. Judge Wasielewski, after a bench trial in August, 1991, declared the apartment building a nuisance under the WDHAL and ordered it sold. Arrieh appealed Judge Wasielewski's order, and was allowed to contest the constitutionality of the WDHAL at the trial court level. When Judge Wasielewski upheld the constitutionality of the WDHAL, Arrieh appealed to the Court of Appeals, which ultimately rendered a lengthy opinion on September 27, 1994 (No. 91-2628, unpublished).

In its opinion, the Court of Appeals concluded that Arrieh was afforded the required due process and, as such, lacked standing to challenge the WDHAL on facial procedural due process grounds; that the WDHAL is not unconstitutionally vague; and that Arrieh is entitled to have the trial court determine whether the closure and sale

of his property under secs. 823.114 and 823.115 constitute an excessive fine under the Eighth Amendment. This Court must determine, under the facts of this case, whether the sale of Arrieh's property constitutes an excessive fine, and whether, if the sale is appropriate, all proceeds constitutionally can be distributed as provided for in the WDHAL.

**Factual Background**

Arrieh owned and lived in a 12-unit apartment building at 620 N. 26th St. He had lived on the property since 1969 and had purchased the remaining shares of the property from relatives in 1987. On June 6, 1990, the Milwaukee Police Department conducted its first undercover drug buy at Arrieh's apartment building. The police sent a confidential informant into an apartment to buy cocaine, but made no arrests. Arrieh was not notified of this incident.

On July 16, 1990, the City of Milwaukee served Arrieh with a letter notifying him that his apartment building was being used to facilitate the delivery or manufacture of a controlled substance and ordered him to abate the nuisance. The notice did not identify which tenant or tenants were allegedly dealing drugs, nor did the notice identify which apartment or apartments were under suspicion.

At the bench trial before Judge Wasielewski, Arrieh testified that the day after he received this notice, he went to the police station to find out which tenants were involved. Arrieh testified he was referred to a police report that had no additional information. Det. Glenn Zirgibel, who was working on the Drug Abatement Team, testified that Arrieh called him on July 17, 1990. Zirgibel testified he told Arrieh there was a drug problem with Apartment 1, and that police would be monitoring the situation. Zirgibel also testified he told Arrieh that Arrieh would be contacted if there were further problems. Nothing in the record indicates that Zirgibel ever contacted Arrieh after their July 17, 1990 conversation.

On July 18, 1990, police conducted a second controlled drug buy, using a confidential informant, at Arrieh's apartment building. No arrests were made and no one contacted Arrieh. On July 22, 1990, police, again using a confidential informant, conducted a third

controlled drug buy. No arrests were made and no one contacted Arrieh.

On July 26, 1990, the City of Milwaukee served Arrieh with a second notice which stated that the property was subject to inspection by the Building Inspector in addition to being at risk for being declared a public nuisance due to alleged drug dealing on the premises. The second notice advised Arrieh of the provisions of the WDHAL and warned him the property could be razed and/or sold. The second notice identified the reasons for the City's action as "further citizen/police drug complaints" and "on-going drug activity as detected by the Drug Abatement Team and/or building code violations." As with the first notice, the second notice did not identify particular tenants or apartments allegedly involved in drug dealing.

In late August, 1990, a neighbor reported to Arrieh that he had observed an unusual number of people entering and leaving Apartment 1 of Arrieh's building. On August 25, 1990, Arrieh served a notice to vacate on William Wells, the occupant of Apartment 1, on the grounds that Wells was creating a nuisance by allowing large numbers of people to enter and leave his apartment. However, after the activity quieted down and complaints from neighbors stopped, Arrieh abandoned his effort to evict Wells.

On August 28, 1990, police arrested tenant Edgar Watson for allegedly dealing drugs outside the apartment building. Because Watson ran into the building when police approached, he actually was arrested inside Arrieh's building. Police did not report Watson's arrest to Arrieh, and Arrieh testified he had no knowledge of the arrest or of any alleged drug dealing by Watson.

On September 4 and 5, 1990, police made two more drug buys, using a confidential informant, from Apartment 4. No arrests were made and no one informed Arrieh that a problem now existed with Apartment 4.

On October 26, 1990, police executed a search warrant on Apartment 1 and arrested William Wells for drug dealing. Police did not report Wells' arrest to Arrieh, but Arrieh inquired of police and learned that Wells had been arrested for drug activity. On November 5, 1990, Arrieh served Wells with a 10-day written notice to vacate

Apartment 1 for maintaining a nuisance. On November 17, 1990, Wells vacated the apartment.

On November 19, 1990, Arrieh sold the apartment building on a land contract for $136,500. At that time, nine apartments were rented and applications were in for two other apartments. The apartment building, at that time, was assessed for tax purposes at $120,000.

On November 27, 1990, the City filed a complaint against Arrieh, alleging that his building continued to be used to facilitate the delivery and manufacture of drugs, and that it was a public nuisance under the WDHAL. The City's complaint sought an injunction requiring the apartment building to be vacated and sold. Arrieh filed an answer denying the allegations and a bench trial was set for August, 1991.

In April, 1991, the land contract vendee defaulted and Arrieh regained possession of the apartment building on May 1, 1991. When Arrieh regained possession of the building, there were only two tenants left, excluding the caretaker. Because several apartments had been extensively damaged by tenants evicted by the land contract vendee, Arrieh spent more than $12,000 repairing the building.

From May, 1991 to the August 23, 1992 bench trial, police--using confidential informants--made six more drug buys at Arrieh's building. No arrests were made, and no search warrants were sought. Arrieh testified he never observed any of the drug buys, nor was he told about them by police as he claimed Det. Zirgibel had promised.

Following the bench trial, Judge Wasielewski found the apartment building to be a public nuisance under sec. 823.113. He ordered it closed down and sold, with proceeds to be distributed to three government agencies, pursuant to secs. 823.114 and 823.115. The property has been vacant of tenants since September, 1991. Although Arrieh claims a loss of rental income exceeding $100,000, he has continued to pay property taxes of approximately $4,000 per year to the City.

## I. EXCESSIVE FINE UNDER THE EIGHTH AMENDMENT

Arrieh argues that the sale of his building is an excessive penalty under the Eighth Amendment to the United States Constitution. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The U.S. Supreme Court has held that a "fine" under the Excessive Fines Clause means either a fine or forfeiture that is "a form of monetary punishment." *Alexander v. United States*, 113 S. Ct. 2766, 125 L.Ed.2d at 455 (1993) whether "in cash or in kind." *Austin v. United States*, 113 S. Ct. 2801, 125 L.Ed.2d at 497 (1993).

Relying on *Austin v. United States* and *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), Arrieh argues that he, an innocent owner not convicted of any crime, has been "fined" the entire value of his building, or $136,500, under sec. 823.114, Stats. (Judgment and order of sale of property) and sec. 823.115, Stats, (Sale of property and use of proceeds).

In *Austin*, the Supreme Court concluded that the Excessive Fines Clause applies to forfeitures under 21 U.S.C. § 881, the federal law providing for forfeiture of vehicles and real property used or intended to be used to facilitate the commission of certain drug-related crimes. The Supreme Court stated, "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." *Austin*, 113 S. Ct. at 2810. The Court also discussed remedial and punitive purposes of forfeitures: "[A} civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Austin*, 113 S. Ct. at 2812 (quoting and adding emphasis to *United States v. Halper*, 490 U.S. 435, 448 (1989).

In *Austin*, the defendant plead guilty to a state charge of possession of cocaine with intent to deliver and was sentenced to seven years in prison. After Austin's sentencing, the United States commenced an *in rem* civil proceeding under 21 U.S.C. secs. 881(a)(4) and (a)(7) seeking the forfeiture of Austin's mobile home

and auto body shop on the grounds that the properties were used, or were intended to be used, to facilitate drug-related crimes covered by sec. 881. (Austin had brought two ounces of cocaine from the mobile home to the body shop to make a drug deal.) The Supreme Court concluded that the Excessive Fines Clause applied to forfeitures of property under 21 U.S.C. § 881 because the crucial question was whether the forfeiture was monetary punishment, not whether the forfeiture is civil or criminal.

The Supreme Court, while deciding that forfeitures under secs. 881(a)(4) and (a)(7) are monetary punishments and are subject to the limitations of the Excessive Fines Clause, declined to establish a test for determining whether a forfeiture is constitutionally excessive, and remanded the case to the trial court for consideration of a proper test. *Austin*, 113 S. Ct. at 2812.

The Court of Appeals, in *Arrieh*, stated that "unquestionably, the property sale sanction is not *'solely* to serve a remedial purpose." *Arrieh*, No. 91-2628 at 48 (unpublished, emphasis in original). The Court of Appeals went on to state:

> The sanction apparently attempts to serve "retributive or deterrent purposes" by delivering what the State concedes are very harsh consequences if property owners fail to maintain, control, and supervise their buildings to prevent drug trafficking. Thus, like the statute considered in *Austin*, although the purposes are remedial, they also are punitive and, therefore, the sanction is subject to Eighth Amendment analysis.

*Arrieh*, No. 91-2628 at 48 (unpublished).

The Court of Appeals also expressed constitutional concerns about the sale, closure and distribution procedures of sec. 823.115 which make it different from other nuisance abatement laws. The statute provides that proceeds from the sale "shall be applied to the payment of the costs of the action and abatement and any liens on the property, and the balance, if any, . . . shall be paid" to the law enforcement agency that brought the action, to the treasurer of the government entity that brought the action for funding of drug and

alcohol treatment programs, and organizations for housing rehabilitation, neighborhood revitalization, and neighborhood crime prevention. Theoretically, a court applying the statute could prevent payment of any of the sale proceeds to the owner.

The Court of Appeals, in remanding this case, asks this Court to determine whether sec. 823.115 unconstitutionally distributes the sale proceeds should the Court decide that closure and sale of Arrieh's building under sec. 823.113, Stats., does not constitute an excessive fine under the Eighth Amendment.

As noted earlier in this decision, the Court of Appeals has remanded the underlying case to the trial court for a determination of whether the *in rem* civil forfeiture is an excessive fine. The Court of Appeals, like the U.S. Supreme Court in *Austin*, declined to establish a test for determining the "excessiveness" of a fine. However, the Court of Appeals provided, in its opinion, some guidance on what it considers an important factor for this Court to take into account: whether the application of sec. 823.113 denies the owner economically viable use of his land under the Fifth and Fourteenth Amendments "taking" by government without just compensation analysis of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

*Nollan* did not deal with nuisance abatement or forfeiture statutes. The case involved the question of whether the California Coastal Commission could condition a grant of a building permit, allowing the property owners to replace a small bungalow on their beach front lot with a larger house, if they agreed to provide a public easement to pass through their section of beach. The Supreme Court stated that a land-use regulation does not effect a taking if it "'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Nollan*, 483 U.S. at 834. The Supreme Court went on to note that its cases "have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Nollan* at 834.

In *Nollan*, the Supreme Court declined to apply a strict scrutiny analysis to the alleged "taking" because the Court found that

property ownership is not such a fundamental right that the strict scrutiny analysis applies. Rather, the Supreme Court found that the "rational basis" test should be employed to analyze the constitutionality of police power which affects the rights of individual property owners. (See also *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 501 (1993) (right to maintain control over home, to be free of government interference, is private interest of historic and continuing importance but not a "fundamental right"). Thus, to pass constitutional muster, a statute affecting property rights must be rationally related to a public purpose and must substantially advance legitimate state interests.

The "substantially advances" test has two parts, as identified by the Supreme Court in *Nollan*. For a statute not to effect a taking, it must (1) substantially advance legitimate state interests, and (2) not deny an owner economically viable use of his land. *Nollan*, 483 U.S. at 834. Clearly, the WDHAL as applied to Arrieh's property would deny him "economically viable use of his land"--indeed, it would deny him *any* use of his land. Arrieh argues that the WDHAL's provisions, which completely extinguish a property owner's rights, go far beyond what is necessary to serve a public purpose. He also argues that an innocent property owner/landlord, without the search, seizure and arrest authority of police, could lose his property because of the actions of a few tenants regardless of whether the owner/landlord knew of the tenants' illegal activity.

Turning to the issue of whether the WDHAL substantially advances legitimate state interests, it is important to note that a reviewing court must not substitute its judgment for that of the state legislature and "must not require the legislature to employ 'the least restrictive alternative' to achieve its goals." *Arrieh*, 91-2628 at p. 41, citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987). In *Arrieh*, the Court of Appeals cautioned that the possibility that "a land use regulation may be somewhat overinclusive . . . is, of course, no justification for rejecting it." *Arrieh*, No. 91-2628 at p. 41, citing *Keystone* at 487.

There is no constitutional requirement that the WDHAL include an "innocent owner" defense. As the Supreme Court held in *Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663, 683 (1974),

"[t]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." In *Austin*, the Supreme Court reiterated the proposition that even though "forfeiture" is understood as punishment, the "innocence" of the owner is rejected as a common law defense to forfeiture. *Austin*, 113 S. Ct. at 2808. Wisconsin courts have upheld the legislature's authority to define nuisance "without any element of knowledge." *State v. Panno*, 151 Wis. 2d 819, 828, 447 N.W.2d 74 (Ct. App. 1989).

**A. The City of Milwaukee**

The City begins its argument by reiterating *Austin's* premise that the historical purpose of the Eighth Amendment's Excessive Fines analysis was to limit the government's power to punish. Writing for the majority in *Austin*, Justice Blackmun framed the issue before the Supreme Court as a two-step inquiry: first, whether forfeiture historically was understood, at least in part, as punishment; and second, whether forfeiture under 21 U.S.C. secs. 881(a)(4) and (a)(7) should be understood as punishment today. *Austin*, 113 S. Ct. 2801, 2806 (1993), citing *United States v. Halper*, 490 U.S. 435 (1989) (discussion of whether a civil penalty in addition to a jail sentence for filing false Medicare claims violated Double Jeopardy clause).

The City urges this Court to consider the historical basis of *in rem* forfeiture, and the idea that an owner who was negligent in allowing his property to be misused was properly punished for his negligence. Historically, the City argues, *in rem* forfeitures have been justified on two theories: first, the fiction that the property itself was guilty of the offense; and second, the idea that the owner should be held accountable for the wrongs of others to whom he had entrusted the property. *Austin*, 113 S. Ct. at 2808.

In its brief, the City discusses a number of tests various federal and state courts have used to develop an Eighth Amendment analysis:

**U.S. v. Real Property at 6625 Zumeriz Drive*, 845 F. Supp. 725 (D.C.Cal. 1994). At issue was the forfeiture of a $600,000 Malibu home which had been used to facilitate the distribution of

cocaine and other controlled substances. The owner was acquitted of criminal charges, but the government proceeded against the property on the theory that the owner did not prevent his son's use of the property to distribute narcotics.

The court developed a three-factor test that was designed to focus on "an evaluation of the relationship of the property to the alleged offense, rather than an analysis of the property's actual monetary value," with no one factor being dispositive. *Id.* at 731-32. The factors were: 1) the inherent gravity of the offense compared with the harshness of the penalty; 2) whether the property was an integral part of the commission of the crime; and 3) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use. *Id.*

**Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001 (1983). This case was the basis for the first factor from *Zumeriz*, the "inherent gravity" prong. *Solem* was an Eighth Amendment Cruel and Unusual Punishments Clause case in which the Supreme Court fashioned a three-prong test: 1) consideration of the gravity of the offense and the harshness of the penalty; 2) comparison of the sentence at issue with the sentences imposed on other criminals in the same jurisdiction; and 3) comparison of the sentence at issue with the sentences imposed for commission of the same crime in other jurisdictions. *Solem*, 113 S. Ct. at 3011.

**U.S. v. One Parcel Property Located at 427 and 429 Hall Street, Montgomery, Alabama*, 853 F. Supp. 1389 (M.D.Ala. 1994). This case involved the forfeiture of a $60,000 commercial building housing a grocery store and beauty parlor. The building was used to facilitate the distribution of cocaine. The court fashioned a two-step balancing test that emphasized the "instrumentality" analysis but included the "proportionality" analysis. The questions to be asked: 1) was there a "substantial connection" between the defendant property and the drug trafficking in question and 2) is the forfeiture of the defendant property a "grossly disproportionate" punishment, given the nature of the drug trafficking involved.

**U.S. v. Certain Real Property Located at 2408 Parliament, Macomb County, Michigan*, 859 F. Supp. 1075 (E.D. Mich. 1994). Here, the government sought forfeiture of an $87,000 home in which

police had discovered more than 400 marijuana plants. The court established a three-prong inquiry combining factual determinations with equitable considerations: 1) How extensive was the use of the property in the underlying crime? 2) What is the value of the property? 3) Given the extent of the property's use in the crime and its value, is forfeiture an excessive penalty? *Id.* at 1077.

**United States v. Chandler*, 36 F. 3d 358 (4th Cir. 1994). The United States sought forfeiture of a 33-acre farm valued at more than $500,000 based on extensive evidence that the owner had packaged, sold and used controlled substances on the farm. The court rejected the *Solem v. Helm* test in favor of a three-part instrumentality test that considers: 1) the nexus between the offense and the property and the extent of the property's role in the offense; 2) the role and culpability of the owner, and 3) the possibility of separating offending property . . . from the remainder." *Chandler* at 365. The court went on to list five factors which, taken together, should enable the court to conclude "under the totality of the circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense." *Id.* at 365. The five factors are 1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; 2) whether the property was important to the success of the illegal activity; 3) the time during which the property was illegally used and the spacial extent of its use; and 5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. *Id.* at 365.

**U.S. v. Certain Real Property Commonly Known as 6250 Ledge Road, Egg Harbor, WI*, 943 F.2d 721 (7th Cir. 1991). Here, the Seventh Circuit reviewed an order of forfeiture based on the discovery of more than 400 marijuana plants at the defendant's Door County home. The defendant argues that only a portion of his land was "substantially connected" to the alleged drug activity, so that forfeiture of the entire tract was erroneous. Relying on *U.S. v. Real Estate Known as 916 Douglas Avenue*, 903 F.2d 490 (7th Cir. 1990), the Seventh Circuit reiterated that "a substantial connection is not required between the property and the related drug offense for forfeiture of real estate under 21 U.S.C. sec. 881(a)(7) . . . the government must only demonstrate that the nexus is more than

incidental or fortuitous." *6250 Ledge Road*, 943 F.2d at 725. The court did suggest that proof of excessiveness would require assigning weight or value to "factors which are typically considered in determining proportionality." *6250 Ledge Road* at 728, citing *U.S. v. Vriner*, 921 F.2d 710, 713, n.5 (7th Cir. 1991).

**People ex rel Waller v. 1989 Ford F350 Truck*, 642 N.E.2d 460 (Ill. 1994). The Illinois Supreme Court considered defendant's argument that the trial court erred in failing to determine whether the civil forfeiture of his truck and a small amount of currency pursuant to the Illinois Controlled Substances Act violated the Excessive Fines Clause. The Illinois Supreme Court decided to adopt the three-prong test formulated in *6625 Zumeriz Drive*, supra, but noted that it was not precluding a trial court from considering additional factors on a case by case basis.

The City argues that the multi-factor tests developed by federal and state courts in response to *Austin* are inadequate as Eighth Amendment excessiveness tests of the WDHAL's sale sanction because the other cases focus on property owners who are not innocent, and because the WDHAL is a nuisance law where the focus is necessarily on the "guilt" of the property at issue. The City argues that the "instrumentality" test developed by Justic Scalia in *Austin* (the test emphasizes a finding of whether the confiscated property has a close enough relationship to the offense. *Austin*, 113 S. Ct. at 2815) is inadequate as the sole test of whether an *in rem* forfeiture violates the Excessive Fines Clause because it excludes consideration of variables which are needed to determine whether the punishment is "excessive." Similarly, the City urges this Court to reject the *Solem v. Helm* test because it dealt with cruel and unusual punishment.

Rather, the City argues that this Court should adopt an expanded version of the three-pronged inquiry used by the Michigan District Court in *2408 Parliament, supra*. The City argues that consideration of the following factors will satisfy the Court of Appeals' directive to apply the principles in *Austin*:

> 1) How did use of the property "facilitate" the delivery or manufacture of controlled substances?

What was the relationship or nexus between the property and the illegal activity? What was the magnitude of the nuisance: that is, how extensive was the illegal activity, in terms of frequency, duration, and scope?

2) What costs have been incurred by the government to investigate and prosecute the nuisance abatement action?

3) What actions did the owner take (or omit to take) and what effect did the owner's action or inaction have on the development of the nuisance?

4) What is the next fair market value of the property to the owner, taking into account liens and encumbrances, if any? If the property produces income to the owner, what income does the owner derive from the property both currently and historically?

Taking into account the foregoing factors, and assigning relative weight to each based upon the facts of the case, the court must determine whether the forfeiture of the property constitutes a disproportionate forfeiture under the Excessive Fines Clause of the Eighth Amendment.

The City cites the following facts from the record to back up each of the four factors it urges as part of its proposed excessiveness test:

**Factor 1*: The City cites the undisputed fact that police made 12 "controlled buys" of cocaine, using informants, from tenants or frequenters at Arrieh's building from June 6, 1990 to August 21, 1990. Three additional buys of crack cocaine were made from people in the building between August 29 and September 4, 1991 (*after* the bench trial conducted by Judge Wasielewski). The City also cites the

July 24, 1990 raid by police on tenant William Wells' apartment (No. 1) and the August 28, 1990 arrest of Edgar Watson (Apartment 5) who was spotted dealing drugs outside the building but was arrested inside after he fled there as proof of pervasive drug trafficking at Arrieh's building (a search of Watson's apartment turned up drugs and a loaded .25-caliber handgun). Wells, the City notes, was still in business dealing drugs from Apartment 6 as of August 26, 1991– during the bench trial. (Arrieh, however, had evicted Wells from Apartment 1 in November, 1990, following Wells' October 26, 1990 arrest for drug dealing).

The City argues that from June, 1990 to September, 1991, "multiple drug dealers operated on a nearly continual basis" from Arrieh's building, making the building "a nexus for persistent and significant cocaine trafficking" that Arrieh was "unwilling or unable to abate." No mention is made by the City of why only Wells and Watson were ever arrested, despite the obvious fact that informants made other drug buys, with increasing frequency as the bench trial date approached.

**Factor 2*: At the bench trial, Det. Glenn Zirgibel testified that between July 1, 1990 and August 23, 1991, police spent 300 hours investigating and prosecuting the case against Arrieh. Testimony also was received that city building inspectors spent another 100 hours investigating the case. The City of Milwaukee claimed at trial that the direct cost of investigating Arrieh's building was $17,000, a number strongly disputed by Arrieh. The City's estimate did not include its legal costs through the trial and subsequent appeals. The City also argues that "indirect costs" of drug dealing on society, although impossible to calculate, should be considered.

**Factor 3*: The City argues that Arrieh and his brother Marshall, the manager of the building, abdicated all responsibility for stopping the drug trafficking in the building because they denied knowledge of a drug problem. The City argues that Arrieh ignored the two notices from the City (although neither notice named a specific apartment or tenant involved) and refused to discuss the drug problem with a detective in May, 1991. (Arrieh had just retaken possession of the building on May 1, 1991.) The Arriehs' explanation

for the May, 1991 discussion was that they thought the meeting was about building code violations.

Under this factor, the City puts a great deal of emphasis on the 53 building code violations that were discovered in a July 23, 1991 inspection (this was about three months after Brahim Arrieh retook possession of the building). The building was cited again on August 27, 1991 for "serious" and "potentially life threatening" violations.

At trial, the City and Marshall Arrieh disputed how many building code violations had been corrected: Marshall claimed 60 percent had been corrected; the city building inspector claimed 10 percent had been corrected. At trial, Brahim Arrieh testified that a new security system was being installed at the entrance, that the front and rear doors were securely locked, and that deadbolts had been placed on apartment doors. However, police sent an informant into the building on August 26, 1991 to buy drugs, and the informant was able to walk in the front door.

Det. Zirgibel also testified that he personally saw the front door of the building wide open on August 29, 1991 and September 3, 1991, and that there was no lock on Apartment 6, where drug paraphernalia was present. Zirgibel testified that as of September 4, 1991, the new lock on Apartment 6 was so poorly installed it fell off, that third floor landing windows were open, and that the lock on the fire escape door had only recently been corrected.

To support its argument that Arrieh's nonchalant attitude led to drug trafficking in his building, the City points to a proposed undertaking in the amount of $2,000 which Arrieh proferred at trial as being totally inadequate. In the undertaking, which was rejected by Judge Wasielewski, Arrieh offered to abate the nuisance, pay the costs of the action, and correct any building code violations. The trial court found the undertaking "wholly inadequate," which the City argues supports its theory that Arrieh didn't care about correcting the drug problem.

**Factor 4*: The City admits that Arrieh's 12-unit building was assessed for tax purposes at $120,000 but claims--without factual support--that the large number of building code violations reduced its value. The City claims--again without factual support--that the 1990

sale price of $136,500 should be reduced for the same reasons. The City makes no mention of the fact that this was an income-producing property for Arrieh, in addition to being his home.

Finally, the City argues that considering all the above factors, the closure and sale of Arrieh's property under the WDHAL does not constitute an excessive fine under the Eighth Amendment. The City urges this Court to place more emphasis on one factor: the evidence it says supports its conclusion that Brahim Arrieh tacitly accepted drug dealing in his building and refused to do anything about it until he was forced to by the City.

The City argues that secs. 823.114 and 823.115, which respectively provide for a judicial order to sell the property and distribute the proceeds to law enforcement agencies, properly serve important remedial purposes. The City argues that sec. 823.115(1) directs that the proceeds of sale shall first be applied to the payment of costs of the action and abatement and satisfaction of any liens on the property. After those parties are compensated, sub. sec. (2) provides that any balance remaining under sub. (1) shall be paid in equal shares to a) the law enforcement agency that brought the action for drug-related law enforcement activities; b) to the treasurer of the local government unit that brought the action to be placed in a fund to provide grants to organizations for drug and alcohol treatment programs; and c) to the same treasurer of local government to fund grants to organizations for neighborhood revitalization and crime prevention.

**B. The State**

Through most of its brief, the State argues that the WDHAL is a nuisance statute and its purpose is wholly remedial, not punitive, such that the Excessive Fines Clause is not implicated. The State argues that Arrieh's reliance on Judge Schudson's opinion in *Arrieh* is misplaced because it doesn't represent the majority view (due to a concurrence by Judges Fine and Wedemeyer). However, it is clear to this Court that the WDHAL has a punitive aspect and that Judges Fine and Wedemeyer specifically state their concurrence is part of

the majority's decision.

The State, like the City, argues that if the Court were to find the closure and sale of Arrieh's property is not an excessive fine, that the legislative provisions for sale of the property and distribution of the proceeds serves a remedial purpose for abating a nuisance. The State points out that before a property can be ordered sold pursuant to sec. 823.114, a court must consider four factors described in sec. 823.113(4):

> (a) The extent and duration of the nuisance at the time of the request.
>
> (b) Prior efforts by the defendant to comply with previous court orders to abate the nuisance.
>
> (c) The nature and extent of any effect that the nuisance has upon other persons, such as residents or businesses.
>
> (d) The effect of granting the request upon any resident or occupant of the premises who is not named in the action, including the availability of alternative housing or relocation assistance, the pendency of any action to evict a resident or occupant and any evidence of participation by a resident or occupant in the nuisance activity.

The State argues that this balancing test, along with the property owner's right to file an undertaking under sec. 823.15, and the provisions for distribution of sale proceeds to various law enforcement and community agencies under sec. 823.115, lead to the conclusion that the WDHAL serves exclusively remedial, and not punitive, purposes. Based on the Supreme Court's decision in *Austin, supra*, this argument rings hollow, as there is clearly a punitive aspect to the WDHAL.

The State also argues that even if this Court were to find the WDHAL imposes a constitutionally excessive fine, that rules of

statutory construction allow for the severability of sec. 823.115 from the WDHAL such that the distribution of proceeds scheme cannot implicate the Excessive Fines Clause. *See* sec. 990.001(11), Construction of laws; rules for; Severability. The State argues that the purpose of the closure and sale is to abate a nuisance, a process it insists is remedial. The State asserts that sec. 823.115(1) then stands on its own, serving a legitimate remedial purpose and compensates a municipality for the costs of abating a nuisance. Again, this Court finds the State's argument that the WDHAL is purely remedial not in accord with more recent U.S. Supreme Court decisions such as *Austin*.

**(1) The excessive test the State recommends**

The State argues that if this Court were to find that the WDHAL is at least partly punitive such that the Excessive Fines Clause is implicated, Justice Scalia's instrumentality test for excessiveness from *Austin* should be applied to an action under the WDHAL. The instrumentality test for excessiveness, based on the historical fiction behind *in rem* forfeitures that the property itself was "guilty" of the offense, "is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense . . . to render the property, under traditional standards, 'guilty' and hence forfeitable?" *Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring) (footnotes omitted; emphasis in original).

The State argues that the WDHAL properly focuses on the harm the instrumentality--in this case a building--creates in the community, rather than focusing on the guilt of the owner. If the property lacks a sufficient nexus to the criminal activity, the forfeiture is excessive. The State asserts that the proper inquiry is about the extent and duration of the drug activity on the property, and concludes that based upon the "extensive nature of drug activity" over an extended period of time, a sufficient nexus exists between Arrieh's building and the nuisance activity to warrant closure and sale under the WDHAL.

**(2) The excessiveness tests the State rejects**

The State discusses a number of the multi-factor tests covered by the City in its brief, including *Zumeriz, 1989 Ford F350 Truck, 2408 Parliament, Solem*, supra; *United States v. Sarabello*, 985 F.2d 716 (3rd Cir. 1993) (pre-*Austin* case which focuses on gravity of offense, defendant's benefit and motive, and the extent to which the property was tainted by criminal conduct); and *United States v. Premises Known as RR No. 1*, 14 F.3d 864 (3rd Cir. 1994) (combining the *Solem* proportionality tests and Justice Scalia's instrumentality test, and the *Sarabello* multi-factor test).

The State then asks this Court not to rely on any particular test because there is lack of agreement between various state and federal courts, but rather use the tests for guidance. The State urges this Court not to place too much emphasis on Arrieh's contention that he was an innocent owner, but rather urges this Court to focus on the extensive harm drug dealing does to the community.

**C. Arrieh**

Arrieh argues that the Excessive Fines Clause applies to both the sale and distribution of proceeds under the WDHAL, secs. 823.114 and 823.115 because the statutes serve both remedial and punitive purposes. He argues that the WDHAL's closure and sale provisions amount to an excessive fine, and argues that if this Court were to find that closure and sale under the WDHAL is proper, that the provisions of sec. 823.115 constitute an excessive fine because none of the proceeds of the sale would be returned to Arrieh.

In his reply brief, Arrieh analyzes City's four proposed factors for determining whether the sale of Arrieh's property constitutes an excessive fine and concludes that, even applying the City's own factors, the closure and sale must be found to be an excessive fine. Under factor 1, Arrieh argues that the relationship or nexus between the building, Arrieh, and the drug dealing tenants is missing, and that the magnitude of the nuisance was not great.

Under factor 2, Arrieh argues strenuously that the City has not established its costs in the action at the trial level. At trial, the City contended it cost the Police Department and Building

Department approximately $17,000 to investigate drug activity and building code violations. Arrieh argues the cost figure was improperly considered because no one from the City with payroll or accounting expertise testified. Even assuming the figure is accurate, Arrieh argues that $17,000 in costs is grossly disproportionate to the $136,500 value of the building (based on the 1990 land contract).

Under factor 3, Arrieh argues that he did take steps to abate the nuisance, including seeking information from the police; evicting a tenant who was arrested (Wells); changing door locks and adding dead-bolt locks in each apartment; screening applications of new tenants more carefully; and installing a security system (this was in the process of being done at the time of trial). Arrieh disputes the City's contention that he didn't try hard enough to evict problem tenants, pointing out that the two notices he received from the Police Department did not identify which apartment(s) or tenant(s) were involved in drug activity. He points out that sec. 704.17(1)(c), Stats., which gives landlords authority to terminate a week-to-week or month-to-month tenancy if the property owner receives a written notice from a law enforcement agency or municipality of a nuisance, did not exist in 1991. Sec. 704.17(1)(c) did not go into effect until March, 1994. Arrieh contends that he did not have the power to quickly remove offending tenants in 1990 and 1991, nor did he have enough information to identify them.

Under factor 4, Arrieh notes there were no liens or encumbrances on the property and that Arrieh had sold it on a land contract in November, 1990 for $136,500. Arrieh states that in the nine months before the building was sold, he spent $40,000 renovating it, and that in the five months before Judge Wasielewski ordered the building closed in September, 1991, Arrieh spent $12,000 more on the building. Arrieh lived in a three-bedroom apartment in the building, and received yearly rents from the other 11 apartments in the amount of $33,300. Arrieh notes that he has lost this annual income since 1991.

Arrieh argues that this Court should reject the instrumentality test advanced by Justice Scalia in *Austin* because it ignores considerations of proportionality, and focuses almost exclusively on the nexus between the property and the criminal activity. (The State

argues for application of this test.) Arrieh points out that while the City argues for adoption of Scalia's instrumentality test, it ignores a portion of Scalia's quote immediately following the test Scalia lays out:

> Scales used to measure out unlawful drug sales, for example, are confiscable, whether made of the purest gold or the basest metal. But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense--the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine.

*Austin*, 113 S. Ct. at 2815.

Arrieh argues that only two arrests were ever made--tenant William Wells in October, 1990 and tenant Edgar Watson (who ran into the building and was arrested) in August, 1990. Arrieh points out that he evicted Wells in November, 1990 but did nothing about Watson because police never told him about Watson's arrest.

Arrieh asks this Court to adopt the three-pronged test articulated in *United States v. Real Property at 6625 Zumeriz Drive*, 825 F. Supp. 725 (C.D.Cal. 1994). The test involves three factors: 1) The inherent gravity of the offense compared with the harshness of the penalty; 2) Whether the property was an integral part of the commission of the crime; and 3) Whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use. *Id.* at 732.

Based upon the guidance offered by the U.S. Supreme Court in *Austin*, and the Court of Appeals in *Arrieh*, this Court finds that the three-pronged test articulated in *6625 Zumeriz Drive* most closely accords with the factors this Court must consider in an excessive fines analysis. For example, prong 1) touches on both a "proportionality" analysis and the *Nollan* takings analysis involving whether an owner is denied economically viable use of his land. Prong 2) touches on the traditional *in rem* forfeiture concept of

property forfeiture (the concept that the property itself was guilty of the offense). Finally, prong 3) takes into account the "nexus" or "instrumentality" requirement between the property and the drug offenses, a concept frequently visited in Eighth Amendment excessive fines cases.

Under factor 1), Arrieh emphasizes that he did not participate in the commission of any drug crimes, and he downplays the seriousness of drug crimes by comparing them to violent crimes, which he argues are more serious. While the Court notes that Arrieh did not participate in drug dealing, it finds Arrieh's apparently cavalier attitude toward drug dealing disturbing. When Arrieh argues that drug dealing isn't a violent crime, he entirely misses the point: drug dealing is a crime that breeds violence on an increasingly large scale. Crack cocaine, with its incredible addictive power, has brought untold misery to all segments of society. Hospital wards care for crack-addicted infants, emergency rooms treat overdoses and victims of cocaine-induced crime, and prisons house those who have committed crimes related to drugs and violence.

Arrieh correctly notes that there is no evidence connecting his building to a large-scale drug packaging and sale operation. He asserts that "isolated" sales of crack cocaine by one or two problem tenants does not indicate that a drug problem of great magnitude existed in his building. He argues that the fact that he would lose the entire value of his building shows that the "penalty" he would suffer is far too harsh compared to the small-scale drug dealing engaged in by known (and unknown) tenants and frequenters at his building.

Under factor 2), Arrieh argues that his apartment building was not an integral part of the commission of any crime, pointing to the secretive nature of the confidential buys behind the closed doors of his tenants' apartments. He asserts that the drug selling could have happened anywhere, and that his building wasn't necessary for completion of drug sales. (Indeed, tenant Watson was selling drugs *outside* the building and was chased into it by police.) The Court agrees that this factor, as Arrieh argues, incorporates Justice Scalia's instrumentality test from *Austin*, and based on the nature of the secretive drug sales occurring in Arrieh's building, the Court cannot say this apartment building was an integral part of the commission

of any crimes.

By so deciding, however, this Court does not mean to suggest that a landlord may avoid a closure and sale under the WDHAL simply by claiming he didn't see any drug activity on his property. It is not a defense to fail to see what is in plain sight.

Under factor 3), Arrieh argues that the drug activity at his building was not extensive either in terms of time or spatial use. He argues that the drug sales occurred in one or two apartments, and that many of the problems occurred while the building was in the possession of the land contract vendee (Judge Wasielewski, according to the trial record, discounted drug activity during the land contract). Finally, Arrieh argues that he was the victim of overzealous prosecution of a new law--the WDHAL--by the City. In essence, he argues his building was targeted and the many controlled drug buys without arrests were merely a set up by the City to shore up a weak case for closure and sale of his property.

Finally, it appears to the Court that Arrieh's case illustrates the situation where a well-intentioned law is flawed in its application. Closure and sale of properties under the WDHAL provides law enforcement with an important tool in the war on drugs, but the law should not be used to punish those, like Arrieh, who took steps to cooperate with city officials but were not entirely successful. Based on the circumstances of this case, the closure and sale of Arrieh's property constitutes an excessive fine under the Eighth Amendment. In so deciding, this Court does not reach the question of whether the proceeds of the sale are properly distributed under sec. 823.115.

**IT IS HEREBY ORDERED** that the closure and sale of defendant Brahim Arrieh's apartment building at 620 N. 26th St., City of Milwaukee, under the Wisconsin Drug House Abatement Law, secs. 823.113 to 823.115, Wis. Stats., violates the Excessive Fines Clause of the Eighth Amendment, and is therefore rescinded.

BY THE COURT:
/s/ Jacqueline D. Schellinger
Circuit Judge, Branch 34

Dated this 31 day of October, 1995, at Milwaukee, Wisconsin.

**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

September 27, 1994

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 91-2628

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

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CITY OF MILWAUKEE,

Plaintiff-Respondent,

v.

BRAHIM ARRIEH,

Defendant-Appellant.

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APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. Affirmed in part; reversed in part and cause remanded with directions.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

SCHUDSON, J. Brahim Arrieh appeals from the trial court judgment rejecting his constitutional challenges to the Wisconsin

Drug House Abatement Law (WDHAL), and ordering the closure and sale of his apartment building, which the trial court declared a public nuisance under the WDHAL. In this case, therefore, we consider the constitutionality of the WDHAL.

The issues are many and complex and, to a substantial extent, their resolution depends on the interpretation and application of two very recent decisions of the United States Supreme Court, ***United States v. James Daniel Good Real Property***, 510 U.S. ___, 114 S. Ct. 492 (1993), and ***Austin v. United States***, 509 U.S. ___, 113 S. Ct. 2801 (1993).[1] Because of the number and complexity of the issues, a brief summary should offer some helpful guidance to this decision.

First, of course, the factual background (Section I.) and the standard of review (Section II.) are provided. Next, the first section of the WDHAL, § 823.113, STATS.., (Section III.), the procedural due process challenges based on claims of vagueness (Section III.A.), and denial of notice and hearing (Section III.B.) are considered.

This opinion then turns to the substantive due process challenges to this first section of the WDHAL (Section III.C.). Initially, this opinion determines whether the WDHAL can effect a "taking" of property (Section III.C.1). Next, this opinion considers the standard for reviewing the constitutionality of the legislature's authorization of the police power in the WDHAL, whether the WDHAL meets that standard and, additionally, whether the WDHAL constitutionally must include an "innocent owner" defense (Section III.C.2.).

Finally, this opinion addresses challenges to the WDHAL that focus primarily on the second and third sections of the law, §§ 823.114 and 823.115, STATS., and their constitutionality under the Excessive Fines Clause of the Eighth Amendment (Section IV).

A majority of this court concludes that: (1) Arrieh was afforded the due process required by ***Good*** and, therefore, he lacks

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[1] Both cases were decided subsequent to the litigation of the instant case in the trial court, and subsequent to the initial briefing in this court. In supplemental letter briefs and in oral arguments to this court, however, the parties extensively addressed the issues with reference to these recent decisions.

standing to challenge the WDHAL on facial procedural due process grounds; (2) the WDHAL is not unconstitutionally vague; and (3) Arrieh is entitled to have the trial court consider whether the closure and sale of his property under §§ 823.114 and 823.115, STATS.., constitute an excessive fine under the Eighth Amendment. We remand the case for that determination.

## I. FACTUAL BACKGROUND

Arrieh owned and lived in an apartment building in Milwaukee. On July 16, 1990, the City of Milwaukee served him with written notice that the building was being used to facilitate the delivery or manufacture of a controlled substance, and ordered him to abate the nuisance.[2] On July 26, 1990, the City served a second

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[2] The notice stated:

13 July 1990

TO: BRAHIM ARRIEH, Owner/Occupant of 620 N 26TH ST City and County of Milwaukee, State of Wisconsin.

SUBJECT: DRUG HOUSE, PUBLIC NUISANCE OF ABOVE ADDRESS

Pursuant to Wisconsin State Statute 823.113 (1) any building or structure that is used to facilitate the delivery or manufacture as stated in S 161.01 (6) and (13) respectively, of a controlled substance in S 161.01 (4), and any building or structure where those acts may take place, is a public nuisance and may be proceeded against under this section.

Accordingly, under this law of the State of Wisconsin you have 5 working days to abate the nuisance at the above address. This means that you must take all means necessary to assure that the sale and or manufacture of illegal drugs at the above address ceases completely.

Unless you abate the nuisance immediately, the property at the above location may be declared a public nuisance by a court of competent jurisdiction.

If the court declares the above property a nuisance it may be ordered under state statutes S 823.113, that all personal property be removed and sold, also order the closure of the building for any purpose.

Further, all person(s) residing on the premises may be required to vacate the

notice informing Arrieh of further drug activity on the premises.[3]

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property, and the property could be ordered razed and/or sold. This includes all the land upon which the structure is located.

The reason for this action is continuing illegal drug activity that has been documented.

Sincerely,

PHILIP ARREOLA
Chief of Police

JOHNNIE L. SMITH
Captain of Police
Vice Control Division

[3] The second notice stated:

23 July 1990

TO: BRAHIM ARRIEH

Owner/Occupant: 620 N. 26TH ST
CITY AND COUNTY OF MILWAUKEE, STATE OF WISCONSIN
- - - - - - - - - - - - - - - - - - - - - - - - -
ABOVE ADDRESS.

SECOND NOTICE OF COMPLAINT

Pursuant to Wisconsin State Statute 823.113 you have previously been notified regarding the above property being considered a public nuisance.

Based upon further investigation this property is now subject to inspection by the Building Inspector and all building codes shall be enforced. This action along with past drug complaints at the above address may result in the building being declared a public nuisance in a court of Milwaukee County, Wisconsin.

In the event the court declares the above property a nuisance, all person(s) residing on the premise, may be required to vacate, and all personal property shall be removed and sold. The court may also order the closure of the building for any purpose.

Further, the court may order the property razed and/or sold. This includes all of the

Both notices advised Arrieh of provisions of the WDHAL and of the potential for closure and sale of his building.

On November 27, 1990, the City filed a complaint against Arrieh, alleging that his building was continuing to be used to facilitate the delivery or manufacture of drugs, and that it was a public nuisance under the WDHAL. The complaint sought an injunction requiring that the building be vacated and sold. Arrieh filed an answer denying the allegations, and a bench trial was held in August, 1991. The trial court found the building to be a public nuisance as defined by § 823.113, STATS., and, on September 5, 1991, entered a written order enjoining Arrieh from "creating, maintaining, permitting or continuing" the nuisance, and ordering him to abate the nuisance and to close the building.[4] The trial court continued the case for consideration of the City's motion for sale of the building, took additional testimony on that issue, and, on September 20, 1991, entered a written order and judgment in favor

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land upon which the structure is located.

The reason for this action is:

1. No response from first notice.
2. Further citizen/police drug complaints.
3. On-going drug activity as detected by the Drug Abatement Team and/or building code violations.
4. Other.

Sincerely,
PHILIP ARREOLA
Chief of Police

JOHNNIE L. SMITH
Captain of Police
Vice Control Division

On the second notice to Arrieh, numbers 2. and 3. were circled.

[4] The order allowed exceptions for Arrieh to continue to use the building as his primary residence, for a building manager or caretaker to reside or be on the premises to work at the building for purposes of maintenance and repair, and for tenants to remain "for such period as may be reasonably necessary for the owner to lawfully terminate said tenancies."

of the City incorporating the previous injunctive relief and orders for abatement and closure, and further ordering sale of the property. The Order for Judgment and Judgment stated, in part:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a public nuisance continues to exist at 620 North 26th Street, Milwaukee, Wisconsin, unabated and in contravention of the Court's prior order of abatement, and the defendant has had both constructive and actual knowledge of drug activity within the building as early as July 1990, and that the defendant has been unable to abate the public nuisance, and that the defendant is unlikely to be able to abate the public nuisance in the future. It is further ordered, adjudged and decreed that said public nuisance is likely and probable to continue.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Brahim Arrieh, is hereby permanently enjoined from creating, maintaining, permitting or continuing the public nuisance at 620 North 26th Street, Milwaukee, Wisconsin.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, based upon the record before the Court, the building commonly known as 620 North 26th Street, Milwaukee, Wisconsin is forthwith ordered closed to all members of the general public except as to: (a) the owner, Brahim Arrieh, occupying Apartment 2, and his expressed guests or invitees; and (b) the caretaker, Earl Beranek, and his expressed guests or invitees; and (c) the lawful current tenants of Apartments 1, 3, 7 and 11, and their expressed guests or invitees; and (d) any agents, servants or employees of the owner while actually under the supervision of the owner and while engaged

in the repair, remodeling or maintenance of said building.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that effective 12:00 midnight September 15, 1991, the building shall be closed to everyone including current tenants but excluding (a) the owner, Brahim Arrieh, and his expressed guests or invitees; and (b) any agents, servants or employees upon the premises actually under the supervision of the owner and while engaged in the actual repair, remodeling or maintenance of said building; and (c) any agent, servants or employees of any unit of government lawfully upon the premises for the purposes of inspecting or determining compliance with any municipal or county ordinance or state statute; and (d) any person lawfully upon the premises under the authority of the Sheriff of milwaukee County pursuant to inspection by prospective buyers for the sale of said building by the Sheriff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, City of Milwaukee, shall provide relocation assistance to the lawful current tenants of Apartments 1, 3, 7 and 11 of the building commonly known as 620 North 26th Street, Milwaukee, Wisconsin. it is further ordered, adjudged and decreed that said assistance shall not include the cost of relocation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, City of Milwaukee, shall forthwith post in and upon said premises notices that said building is closed to the general public except as herein provided and that anyone who enters or who remains upon said premises in violation of sec. 823.114(2), Wis. Stats.,

shall be subject to punishment for contempt of this Court's order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Brahim Arrieh, provide a statement in writing within five (5) days to the plaintiff, City of Milwaukee, outlining the steps the defendant will take to insure the closure of the building commonly known as 620 North 26th Street, Milwaukee, Wisconsin.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the building commonly known as 620 North 26th Street, Milwaukee, Wisconsin, and the lands upon which it is situated, shall forthwith be sold at the highest available price at public sale by the Sheriff of Milwaukee County pursuant to sec. 823.115, Wis. Stats., and that notice of said sale shall be made pursuant to sec. 815.31, Wis. Stats. The Sheriff shall further do such things and provide such notice as is set forth in sec. 846.16, Wis. Stats. ("Notice and Report of Sale"). It is further ordered, adjudged and decreed that said sale shall be subject to confirmation by this Court.

On October 1, 1991, the City filed a motion for order of contempt for Arrieh's alleged failure to comply with the trial court's orders to abate the nuisance and close the building. See § 823.114(2), STATS. On October 8, 1991, Arrieh retained new counsel who moved to dismiss the City's contempt motion and raised, for the first time, a challenge to the constitutionality of the WDHAL on its face. The trial court adjourned the City's motion and, on December 10, 1991, entered a written order relieving Arrieh from operation of the judgment "solely for the expressed purpose of allowing the defendant an opportunity to be heard only on the question of whether or not sec. 823.113, Wis. Stats., *et seq*, is

facially unconstitutional and therefore void."[5] In the meantime, Arrieh appealed from the trial court's September 20, 1991, judgment. On April 1, 1992, this court ordered a stay of the appellate proceedings in order to allow the trial court to hear and determine Arrieh's constitutional challenge. On June 15, 1992, the trial court issued its memorandum decision rejecting Arrieh's constitutional arguments.

## II. STANDARD OF REVIEW

The constitutionality of a statute is a question law, which we review de novo. ***State v. Borrell***, 167 Wis.2d 749, 762, 482 N.W.2d 883, 887 (1992). Statutes are presumed to be constitutional. ***Id.*** Every presumption must be indulged to sustain the constitutionality of statutes whenever possible, and should doubt exist, it must be resolved in favor of constitutionality. ***Zintek v. Perchik***, 163 Wis.2d 439, 478, 471 N.W. 2d 522, 538 (Ct. App. 1991). As the Supreme Court explained:

> Legislative enactments are presumed constitutional, and this court has stated it "will sustain a statute against attack if there is any reasonable basis for the exercise of legislative power." the party bringing the challenge must show the statute to be unconstitutional beyond a reasonable doubt. "Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." "The court cannot reweigh the facts found by the legislature. If the court can conceive any facts on which the legislation could reasonably be

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[5]The trial court also ordered that during the pendency of the constitutional litigation, pursuant to the parties' stipulation, Arrieh would keep the building closed except for his own residence, his caretaker's residence, their guests, the tenants of four apartments and their guests, and persons repairing, remodeling, or maintaining the building.

based, it must hold the legislation constitutional."

***State v. McManus***, 152 Wis.2d 113, 129, 447 N.W. 2d 654, 660 (1989) (citations omitted). Further, as the United States Supreme Court explained, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." ***U.S. v. Salerno***, 481 U.S. 739, 745 (1987).

## III. SECTION 823.113

Arrieh argues that § 823.113, STATS., the first section of the Wisconsin Drug House Abatement Law, is unconstitutional on its face. Section 823.113 provides:

> 823.113 Drug house a public nuisance; action for abatement. (1) Any building or structure that is used to facilitate the delivery or manufacture, as defined in s. 161.01(6) and (13) respectively, of a controlled substance, as defined in s. 161.01(4), and any building or structure where those acts take place, is a public nuisance and may be proceeded against under this section.[6]

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[6] Sections 161.01(4), (6), and (13), STATS., provide the following definitions:

(4) "Controlled substance" means a drug, substance or immediate precursor in schedules I to V of subch. II.

(6) "Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

(13) "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container,

(2) If a nuisance exists, the city, town or village where the property is located may maintain an action in the circuit court to abate the nuisance and to perpetually enjoin every person guilty of creating or maintaining the nuisance, the owner, lessee or tenant of the building or structure where the nuisance exists and the owner of the land upon which the building or structure is located, from continuing, maintaining or permitting the nuisance.

(3) If the existence of the nuisance is shown in the action to the satisfaction of the court, either by verified complaint or affidavit, the court shall issue a temporary injunction to abate and prevent the continuance or recurrence of the nuisance, including the issuance of an order requiring the closure of the property. Any temporary injunction issued in an action begun under this subsection shall be issued without requiring the undertaking specified in s. 813.06.[7]

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except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging or labeling of a controlled substance:

(a) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or

(b) By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching or chemical analysis and not for sale.

[7] Section 813.06, STATS., states:

813.06 Security for damages. In proceedings under s. 767.23 the court or judge may, and in all other proceedings except proceedings under ss. 813.12, 813.122, 813.125 and 823.113 the court or judge shall, require a bond of the party seeking an injunction, with sureties, to the effect that he or she will pay to the party enjoined such damages, not exceeding an amount to be specified, as he or she may sustain by reason of the injunction if the court finally decides that the party was not entitled thereto. Copies of such bond, affidavit or other pleading shall be served upon the

(4) In ruling upon a request for closure, whether for a defined or undefined duration, the court shall consider all of the following factors:

(a) The extent and duration of the nuisance at the time of the request.

(b) Prior efforts by the defendant to comply with previous court orders to abate the nuisance.

(c) The nature and extent of any effect that the nuisance has upon other persons, such as residents or businesses.

(d) The effect of granting the request upon any resident or occupant of the premises who is not named in the action, including the availability of alternative housing or relocation assistance, the pendency of any action to evict a resident or occupant and any evidence of participation by a resident or occupant in the nuisance activity.

Although Arrieh's theories meander and frequently overlap, they essentially maintain that this section of the WDHAL denies procedural due process of law because of vagueness, and because of the failure to require notice and hearing prior to property closure. He also apparently contends that the WDHAL denies substantive due process of law by providing an overbroad extension of police power, by taking property without just compensation, and by failing to allow for an innocent owner defense.[8]

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party enjoined and the officer serving the same shall, within 8 days after such service, file his or her return in the office of the clerk of the court.

[8] Without reference to authority, Arrieh also briefly argues that the WDHAL is unconstitutional as applied to him in this case. This issue, however, was never addressed by the trial court. Its written decision stated, "No question is presented here of applying the WDHAL to specific facts." Accordingly, except to the

## A. PROCEDURAL DUE PROCESS--VAGUENESS

Arrieh argues that the statute sets a standard that is so uncertain that "the person of ordinary intelligence" is denied "a reasonable opportunity to know what is prohibited, so that he may act accordingly." ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972). He points to these words:

> Any building or structure that is used to facilitate the delivery or manufacture ... of a controlled substance, ...and any building or structure where those acts take place, is a public nuisance and may be proceeded against under this section.

Section 823.113(1), STATS. (emphasis added). He maintains that "facilitate" is unconstitutionally vague because, in the words of ***State v. Zwicker***, 41 Wis.2d 497, 164 N.W. 2d 512 (1969), it is "`so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability.'" ***Id.***, 41 Wis.2d at 507, 164 N.W.2d at 517 (citation omitted). Further, Arrieh argues that the statute is impermissibly vague because it fails to define the quantity or quality of proof required to establish "nuisance," and offers to "minimal guidelines to govern law enforcement."

Although the City and State address Arrieh's arguments, they first respond that Arrieh lacks standing to challenge what he considers the vagueness of the WDHAL. The City and State are correct.

Standing depends on a personal stake in the controversy, and if a party "has a distinct and palpable injury traceable to the challenged conduct, that satisfied the personal stake requirement." ***Polan v. DOR***, 147 Wis.2d 648, 658, 433 N.W.2d 640, 644 (Ct. App. 1988). "Whether a party has standing is a question of law." ***Id.***

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extent necessary to determine standing, we decline to consider the "as applied" issues.

In *City of Milwaukee v. K.F.*, 145 Wis.2d 24, 426 N.W.2d 329, (1988), youths arrested for violating a city curfew ordinance presented a vagueness challenge to the ordinance and its term, "congregate." The supreme court refused to reach the merits of their claim, however, explaining:

> Prior to embarking upon an analysis of the ordinance upon vagueness grounds, this court must first determine whether the appellants' conduct is clearly proscribed by the ordinance because "a plaintiff whose conduct is clearly proscribed by the statute in question cannot complain of the vagueness of a law as applied to others; the law must be impermissibly vague in all of its applications."

*Id.*, 145 Wis.2d at 33.34, 426 N.W.2d at 333 (citation omitted). Thus, although the appellants in K.F. presented a facial challenge to what they considered the vagueness of the ordinance, the supreme court reasoned that the "analysis of the challenge to the vagueness of the ordinance must necessarily commence with consideration of whether the ordinance, as applied to the appellants, clearly proscribed their conduct." *Id.*, 145 Wis.2d at 35, 426 N.W.2d at 334. Noting that at least ninety other juveniles were with the appellants, the supreme court declared, "Whatever possible ambiguities might be hypothetically constructed as to the application of the term `congregate' as used in the ordinance, a function in which such a large number of youths is assembled unequivocally constitutes a `congregation.'" *Id.* Thus, the supreme court concluded that the appellant lacked standing to challenge the ordinance as unconstitutionally vague. *Id.*, 145 Wis.2d at 38-39, 426 N.W.2d at 335-336.[9]

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[9] *See also State ex rel. Skinkis v. Treffert*, 90 Wis.2d 528, 280 N.W.2d 316 (Ct. App. 1979), in which, in the context of a facial vagueness challenge to a criminal statute, we concluded:

Where, as here, the claim of unconstitutionality is grounded on facial vagueness, and first amendment rights are not involved, the defendant "will not be heard to

In this case, the trial court concluded that Arrieh's building was a nuisance based on factual findings of numerous controlled substance sales taking place there. The uncontroverted evidence established that undercover police were able to make "controlled buys" from a tenant of one of the apartments and, after his eviction, were able to continue buying from him when he occupied another apartment in the building. The evidence also established that the lack of building supervision, door locks, and security systems allowed non-residents to enter and buy drugs without interference. Thus, although Arrieh considers "facilitate" impermissibly vague, he does not challenge the trial court's conclusion that drug sales were taking place and that a drug-dealer was using the building to accomplish those sales. Thus, the conduct in this case "is clearly proscribed," and, therefore, under K.F., Arrieh lacks standing to maintain that "facilitate" is impermissibly vague.[10]

Arrieh further pursues his vagueness challenge. Quoting ***Smith v. Goguen***, 415 U.S. 566 (1974), the case in which the Supreme Court found unconstitutionally vague an ordinance provision that punished one who "`publicly ... treats contemptuously the flag of the United States,'" Arrieh also argues that the more important aspect of the vagueness doctrine is "the requirement that a legislature establish minimal guidelines to govern law enforcement." ***Id.***, 415 U.S. at 573-574. Thus, because the WDHAL does not specify the quantity or quality of evidence required to prove that a building is a public nuisance, and because it doe snot require proof of any arrest or conviction arising out of prohibited drug-

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hypothesize other factual situations which might raise a question as to the applicability of the statute," but is limited to the conduct actually charged in the complaint.

*Id.*, 90 Wis.2d at 542-543, 280 N.W.2d at 323 (citation omitted).

[10] Arrieh also points to the uncertainty that, for others, may arise from the statute's clumsy phrasing, in § 823.113(1), STATS., that fails to explicitly state whether "those acts" encompasses "facilitate" or merely refers to "delivery or manufacture." Here again, however, Arrieh lacks standing because the unchallenged trial court findings confirm both facilitation and delivery. Thus, the conduct in this case "is clearly proscribed" regardless of any uncertainty in that statutory phrasing.

dealing to establish nuisance, he contends that the statute is impermissibly vague. Once again, however, Arrieh does not challenge the trial court's finding of drug-dealing in his building, or the finding that the building conditions helped to allow the drug-dealing to take place. Moreover, although Arrieh argues that "the land owner could lose its property without the City ever giving notice of specific activities occurring on the premises," the evidence established that he did receive notice of specific criminal activities; whether they resulted in arrests or convictions is immaterial to the constitutionality of the WDHAL. Therefore, we again conclude that the "conduct is clearly proscribed" and Arrieh lacks standing to challenge what he considers the vagueness or lack of minimal guidelines to govern law enforcement.[11]

## B. PROCEDURAL DUE PROCESS – NOTICE AND HEARING

In a supplemental letter to this court, and at oral argument, Arrieh maintained that, under the recent United States Supreme Court decision in ***United States v. James Daniel Good Real Property***, 510 U.S. ___, 114 S.Ct. 492 (1993), the WDHAL is unconstitutional because it fails to require notice and hearing prior to property closure.[12] In ***Good***, the Supreme Court held that "the Due Process

[11] We note that Arrieh, in his reply brief, does not respond to the State's or City's argument that he lacked standing on these issues.

[12] The trial court rejected Arrieh's argument that procedural due process required notice and hearing, *prior to issuance of a temporary injunction* ordering abatement. On appeal, we do not understand Arrieh to be challenging that trial court conclusion. Rather, based on *Good*, Arrieh now argues that procedural due process requires notice and hearing *prior to closure and sale*.

The distinction also is important because of the difference between the opportunity for a pre-seizure hearing and the subsequent opportunity for a pre-compensation hearing. Thus, in *Good*, the Supreme Court rejected the government's argument that "the availability of a post-seizure hearing" obviated the need for a pre-seizure hearing to satisfy procedural due process. The Court explained that the pre-seizure adversarial hearing, absent exigent circumstances, was "of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. Moreover, the availability of a postseizure hearing may be no

Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard." *Id.*, 114 S. Ct. at 497. To evaluate Arrieh's constitutional theory, an understanding of ***Good*** is essential.

Good pled guilty to a state criminal drug charge stemming from a search warrant that resulted in seizure of drugs from his home. Four and one-half years after the drugs were seized, the United States filed an in rem action in the United States District Court, under 21 U.S.C. § 881(a)(7), seeking forfeiture of Good's house and the land where it was located, on the grounds that the property had been used to commit or facilitate commission of a federal drug offense.[13] ***Id.***

Ten days later, in an *ex parte* proceeding, a United States Magistrate Judge found that the government had established probable

recompense for losses caused by erroneous seizure." *Id.*, 114 S. Ct. at 502 (citation omitted). The Court did not, however, in any way suggest that such a pre-seizure hearing would require consideration of compensation issues. "The Constitution declares that private property shall not be taken `for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken." *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 659 (1890)(Cherokee Nation can maintain suit in equity against railway company to contest whether taking was within power of eminent domain and, in the alternative, to seek compensation).

[13] Title 21 U.S.C. § 881(a)(7) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

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(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

cause to believe that Good's property was subject to forfeiture. ***Id.*** A warrant of arrest in rem issued for seizure of Good's property, and a few days later the property was seized without either prior notice to Good or an adversarial hearing at which he could have been present. Id., 114 S. Ct. at 497-498. At the time of seizure, Good was not living in his home but was renting it to tenants for $900 per month. ***Id.***, 114 S. Ct. at 498. Good challenged the seizure, asserting, among other things, that it deprived him of property without due process of law. ***Id.*** The Court of Appeals for the Ninth Circuit unanimously held that the seizure, without prior notice and hearing, violated the Due Process Clause. ***See United States v. Good***, 971 F.2d 1376 (1992). In a five to four decision, the Supreme Court agreed. ***See*** 114 S. Ct. at 498-505.

The Due Process Clause of the Fifth Amendment guarantees, "No person shall . . . be deprived of life, liberty, or property, without due process of law." ***Good*** emphasized, "Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the government deprives them of property." ***Id.***, 114 S. Ct. at 498. Despite what two dissenting justices referred to as "the long history of *ex parte* seizures of real property through civil forfeiture," *see id.*, 114 S. Ct. at 509 (Chief Justice Rehnquist, joined by Justice Scalia, dissenting); *see also id.*, 114 S. Ct. at 511-512 (O'Connor, J., concurring in part; dissenting in part), the Court rejected the government's argument that "the seizure of real property under the drug forfeiture laws justifies an exception to the usual due process requirement of preseizure notice and hearing." *See id.*, 114 S. Ct. at 498-499.

The Supreme Court acknowledged the substantial governmental interests furthered by seizure of such property, but found no justification for an exception to the due process requirement of preseizure notice and hearing, absent exigent circumstances. The Court noted that some exceptions to the general rule requiring notice and hearing can be tolerated, "but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" ***Id.***, 114 S. Ct. at

501.14[14] The Court then analyzed whether the government's seizure of Good's property presented such an extraordinary situation. "Whether the seizure of real property for purposes of civil forfeiture justifies such an exception requires an examination of the competing interests at stake, along with the promptness and adequacy of later proceedings. *Id.* To carry out that examination, the court utilized the "three-part inquiry" of ***Mathews v. Eldrige***, 424 U.S. 319 (1976).

> The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose.

***Good***, 114 S. Ct. at 501. Utilizing the same criteria, Arrieh argues that a ***Good/Mathews*** analysis exposes the facial infirmity of the WDHAL for its failure to require a pre-seizure hearing.

The City and State respond that because the WDHAL is a nuisance statute, rather than a civil forfeiture statute, ***Good*** does not apply. They are incorrect. Nothing in ***Good*** suggests that, somehow, analysis of "the seizure of real property under the drug forfeiture laws" would exclude drug forfeiture laws found within the framework of a nuisance statute.[15] The issue is not whether the

[14] The concurring opinion claims that this opinion "ignores that there are situations when pre-closure notice and a pre-closure hearing would not only be contrary to the public interest but not constitutionally required." Concurrence, slip op. at 2-3. That claim is incorrect. This opinion relies substantially on *Good*, which states that exigent circumstances can allow for property seizure without what otherwise would be the constitutionally required pre-closure notice and hearing. Thus, there is no disagreement that this opinion "should not be read as preventing use of the Drug House Abatement Law's emergency procedures when that is necessary for the common good." Concurrence, slip op. at 5. Such use, however, must be constitutional and, therefore, must comply with *Good*.

[15] If anything, the fact that the instant case comes within the context of a nuisance action makes the applicability of *Good* all the more clear. After all, unlike Good who was convicted of a crime and faced forfeiture of the very property he used in

statute is denominated a nuisance or a drug forfeiture statute. Nor is the issue whether the government has a legitimate interest in seizing property in order to prevent, deter, or punish drug trafficking. As succinctly stated in ***Good***, the governmental interest at issue "is not some general interest in forfeiting property but the specific interest in seizing real property *before* the forfeiture hearing." (Emphasis added.)

Thus, under ***Good***, the constitutional question is not whether WDHAL *precludes* notice and hearing before closure. It does not. The question is whether the statute *allows* a court to order closure, absent exigent circumstances, without notice to the property owner and a meaningful opportunity for the owner to be heard. Arrieh contends that § 823.113, STATS., by providing that once "the existence of the nuisance is shown . . . to the satisfaction of the court, either by verified complaint or affidavit, the court shall issue a temporary injunction . . . *including the issuance of an order requiring the closure of the property*," the WDHAL violates ***Good*** by failing to require pre-seizure notice and hearing.

The State first responds that the WDHAL sufficiently protects against an erroneous deprivation of property because "a trial court reviewing a temporary injunction request has the statutory right to notify the other party" under § 813.02(1)(b), STATS. This argument is not persuasive. In the first place, it relates to the temporary injunction procedure on which the trial court rejected Arrieh's challenge, and from which Arrieh does not appeal. In the second place, it fails to meet the mandate of ***Good***. A trial court's "right" to provide notice would be at the trial court's option, thus falling short

commission of the crime, Arrieh has not been charged or convicted of any crime. This distinction was of apparent significance for all four dissenting justices. Justice O'Connor referred to the fact that "the warrant affidavit indicated that the property owner had already been convicted of a drug offense involving the property." *Id.*, 114 S. Ct. at 513. Justice Thomas emphasized that "the property owner was previously convicted of a drug offence involving the property." *Id.*, 114 S. Ct. at 516 (citation omitted). Chief Justice Rehnquist, with whom Justice Scalia joined, emphasized that the federal law covered "property owners who have been convicted of a crime that renders their property susceptible to civil forfeiture." *Id.*, 114 S. Ct. at 507.

of the ***Good requirement*** to do so, absent exigent circumstances.[16]

The State goes on, however, to argue that in ruling on a request for closure under § 823.113(4), STATS., "the court must consider several factors, including: the extent and duration of the nuisance, efforts by the defendant to abate the nuisance, the effect the nuisance has upon the neighborhood, the effect a closure would have on persons not named in the action." *See* State's Brief 27-28 (citing §823.113(4)(a) - (d), STATS.). Indeed, in this case, although the procedures were carried out three years before the ***Good*** decision, they proved to be consistent with ***Good's*** holding. The City provided notice to Arrieh. The trial court provided a full adversarial trial before ordering seizure.[17] Arrieh does not contend that his property was seized before he received notice or hearing. Instead, he argues that the WDHAL could be interpreted and applied to allow for property seizure prior to notice and hearing, in violation of ***Good***. However, neither the City nor the trial court did so. Thus, Arrieh suffered no such denial of due process and, therefore, he lacks standing to pursue that constitutional challenge.[18]

The concurring opinion laments what it considers this opinion's "excursion into the netherworld of *dictum*" on this issue. Concurrence, slip op. at 2. The very determination of Arrieh's standing, however, requires the analysis with which the concurring opinion agrees, and which, in turn, inevitably requires our consideration of Arrieh's specific circumstances in relation to the

[16] At oral argument before this court, the City conceded that if closure under the WDHAL was equivalent to forfeiture, *Good* would require that, to be constitutional, the WDHAL be construed to mandate a pre-closure hearing.

[17] Apparently, the trial court's interpretation and application of the statute also proved to be consistent with the subsequent mandate of *Good*. The trial court's written decision stated that in considering a request to order closure of the building, "the court is directed to weigh certain equitable factors" specified in § 823.113(4)(a) - (d), STATS. Logically, the trial court apparently concluded that several of these factors certainly would require Arrieh's presence for fair consideration.

[18] On this issue, the City did not challenge Arrieh's standing, and the State did so with only a single sentence in its brief, unsupported by authority. Here, again, however, Arrieh failed to offer any reply argument that he did have standing on this issue.

Supreme Court's decision in ***Good***. We must no blithely ignore ***Good*** when, rather obviously, the constitutionality of the WDHAL must be measured by its holding. ***Good's*** holding is clear. The WDHAL's facial flaw, under ***Good***, is equally clear. Although Arrieh lacks standing to expose that flaw in relation to his own case, we need not ignore the importance of addressing this issue where, under ***Good***, the arguments are fully developed and the answer is clear.

## C. SUBSTANTIVE DUE PROCESS

Arrieh also contends that the WDHAL denies him substantive due process. Although somewhat confusing, his theories seem to be: (1) that the WDHAL, on its face, unconstitutionally allows for taking of property without just compensation; (2) that the WDHAL, on its face, unconstitutionally extends police power beyond what is necessary and appropriate to serve valid public purposes and, therefore, is overbroad; [19] and (3) that the WDHAL, on its face, unconstitutionally allows for forfeiture of the property of an innocent owner and, further, because, Arrieh contends, he is an innocent owner, the WDHAL is unconstitutional as applied to him.

### 1. Taking

Arrieh argues that under the Fifth and Fourteenth Amendments, the WDHAL is unconstitutional because it provides for the taking of

[19] The Wisconsin Supreme Court has explained:

> Statutes which are unconstitutionally vague often suffer also from the defect of overbreadth. While a statute may often be found both vague and overbroad at the same time, nevertheless the two concepts are distinct. A statute is too vague when it fails to give fair notice of what it prohibits. It is overbroad when its language, given its normal meaning, is so broad that its sanctions may apply to conduct which the state is not entitled to regulate.

*State v. Starks*, 51 Wis.2d 256, 263, 186 N.W.2d 245, 249 (1971).

private property for public use without just compensation. The City responds that the WDHAL does not provide for a taking of private property because, "[i]n every respect it exemplifies the application of the state's police power to seize, and if necessary, to work a forfeiture on, private property which by its use (or misuse) threatens the public health, safety and welfare." The City, in effect, thus contends that Arrieh's theory must be rejected because the WDHAL provides for property seizure, closure, and sale in reponse to a nuisance, rather than for eminent domain taking in response to a public need.

The City's argument elevates form over substance. It ignores the chameleon-like potential of eminent domain takings and nuisance forfeitures. Indeed under some circumstances, "The eminent domain power is equated with the police power." ***Hawaii Housing Auth. v. Midkiff***, 467 U.S. 229, 240 (1984). Substantive due process analysis requires more than mere reference to the nominal classification of a statute. "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'" ***Moore v. City of East Cleveland***, 431 U.S. 494, 503 (1977) (brackets in original; citation omitted).

Thus, the police power exerted in a nuisance forfeiture action can constitute a taking. In ***Pennsylvania Coal Co. v. Mahon***, 260 U.S. 393 (1922), the Supreme Court considered a case that, nominally, involved neither an eminent domain taking nor a nuisance forfeiture, but rather, a statutory prohibition of the mining of anthracite coal in a way that would cause the subsidence of a house on the surface above the coal. The question, the Court said, "is whether the police power can be stretched so far." *Id.*, 260 U.S. at 413.[20] Concluding that such statutory regulation of land extended the police power to the point where it effected a taking without just compensation, the Court found the law unconstitutional. Justice Holmes explained:

[20] The case involved a single private house resting on land whose deed conveyed only the land surface and expressly reserved the right to remove the coal. The Court, however, treated the case "as one in which the general validity of the act should be discussed." *Id.*, 260 U.S. at 414.

> Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

*Id.* Measuring where that "certain magnitude" might be would not always be precise or predictable.

> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . .[T]his is a question of degree--and therefore cannot be disposed of by general propositions.

*Id.*, 260 U.S. at 415-416. Of additional significance to the instant case is the fact that, in ***Pennsylvania Coal***, the Court rejected the dissenting position that the police power was lawful because it was in response to a nuisance.[21]

Even more directly, in ***Sweet v. Rechel***, 159 U.S. 380 (1895), the Supreme Court explained that nuisance abatement statutes can

[21] [T]he right of the owner to use his land is not absolute. He may not so use it to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation . . . [R]estriction imposed to protect the public health, safety, or morals from dangers threatened is not a taking.

*Id.*, 260 U.S. at 417 (J. Brandeis, dissenting).

involve issues of taking and just compensation when they authorize not only abatement of a nuisance, but appropriation of the land as well.[22] The Court emphasized the significance of

> [t]he difference between an act passed with exclusive reference to the police power of the state, without any purpose to take and apply property to public uses, and a statute . . . which, for the general good, ordains and establishes regulations declaring the existence of a nuisance created by the condition of particular property, and, *in addition*, and as the best mode of accomplishing the end in view, authorizes the same property to be appropriated by the public . . .

*Id.*, 159 U.S. at 399 (emphasis in original).

At oral argument the State contended that this court should not evaluate the WDHAL seizure, closure, and sale as a taking or forfeiture because, under the statute, the property owner has the opportunity to retain ownership by providing an adequate "undertaking." See § 823.15, STATS.[23] This argument is not

[22] The case arose from a property ownership dispute in a probate proceeding. Ownership hinged on whether the City of Boston had lawfully obtained title to the property under a Massachusetts statute, "'An Act to Enable the City of Boston to Abate a Nuisance Existing Therein, and for the Preservation of the Public Health in Said City.'" *Id.*, 159 U.S. at 382. As summarized by the Court, the statute addressed the nuisance of land that, "[b]y reason of its grade being lower, and because it was incapable of being properly drained . . . was such . . . as to endanger the public health." *Id.* The statute provided the city authority to "'purchase or otherwise take the lands . . ., with the buildings and other fixtures thereon.'" *Id.*

[23] Section 823.15, STATS., provides:

> Undertaking to release building or structure. The owner of any building or structure, or the owner of the land upon which the building or structure is located, affected by an action under s. 823.10 or 823.113 may appear at any time after the commencement of the action and file an undertaking in a sum and with the sureties required by the court to the effect that he or she will immediately abate the alleged nuisance, if it exists, and prevent the same from being reestablished in the building or structure, and will pay all costs that may be awarded against him or her in the

persuasive. The potential for any undertaking allows a financially able owner to attempt to retain ownership after the government has commenced an action to seize property in order to abate a nuisance. That potential, however, does not guarantee success. In the instant case, for example, the trial court rejected Arrieh's undertaking as insufficient. Further, even a successful undertaking, while retaining property ownership, still may leave issues of diminished value and "constructive taking." See ***Just v. Marinette County***, 56 Wis.2d 7, 23, 201, N.W.2d 761, 771 (1972) ("loss of value is to be considered in determining whether a restriction is a constructive taking").

Thus, in Wisconsin, whether the exercise of the police power constitutes a taking may be "a matter of degree," determined not by the nominal nature of a statute, but rather, by its actual impact.

> The protection of public rights may be accomplished by the exercise of the police power unless the damage to the property owner is too great and amounts to a confiscation. The securing or taking of a benefit not presently enjoyed by the public for its use is obtained by the government through its power of eminent domain. The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner. In the valid exercise of the police power reasonably restricting the use of property, the damage suffered by the owner is said to be incidental. However, where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though

action. Upon receipt of the undertaking, the court may dismiss the action as to the building or structure and revoke any order previously made closing the building or structure; but that dismissal and revocation shall not release the property from any judgment, lien, penalty, or liability that the property is subject to by law. The court has discretion in accepting any undertaking, the sum, supervision, satisfaction, and all other conditions of the undertaking, but the period that the undertaking shall run may not be less than one year.

> the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense.
>
> Many years ago, Professor Freund stated in his work on The Police Power, sec. 511, at 546-547, "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful.... From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not." Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.

*Id.*, 56 Wis.2d at 15-16, 201 N.W.2d at 767.

The WDHAL provides the basis for both. It allows government to restrict property use to prevent the public harm of drug dealing and, in § 823.115, STATS., as explained in section IV of this decision, it also allows for creation of public benefits by selling the property and using the proceeds for drug-related law enforcement, drug and alcohol treatment programs, housing rehabilitation, and neighborhood revitalization and crime prevention. Depending on the circumstances, it may be that the property owner "ought not to bear such a burden for the public good." *Id.*, 56 Wis.2d at 15, 201 N.W.2d at 767. That determination often will require case-by-case analysis.

> There is a limit to the extent to which the state may restrict the use of property or damage property under the police power. What amounts to deprivation of property without due process of law is often difficult to determine, and the determination largely depends

upon the nature of the particular case.

***State v. Herwig***, 17 Wis.2d 442, 447, 117 N.W.2d 335, 338 (1962).[24] In Herwig, the supreme court rejected the government's position that when government deprives an owner of property through use of the police power, "any degree of damage resulting from the exercise of such power to a private landowner must be suffered in legal silence." Id. As the court explained, the government's argument, "carried to its ultimate conclusion would make unnecessary the power of eminent domain" because the government, merely by invoking the police power, would be able to preempt reasonable challenges to property taking.[25] See id.

Unlike many nuisance abatement laws that provide for the police power to restrict or regulate the use of property, the WDHAL provides authority to seize, close, and sell property. Clearly, that can constitute a taking. Thus, while "hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances," ***Keystone Bituminous Coal Ass'n v. DeBenedictis*** 480 U.S. 470, 491 (1987), is acknowledged, far more than mere restraint is encountered here.[26] Accordingly, despite the fact that the WDHAL

[24] The United States Supreme Court has emphasized the need for case-by-case analysis of the proper exercise of police power. "An attempt to define its [police power] reach or trace its outer limits is fruitless, for each case must turn on its own facts." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

[25] Many years earlier, the supreme court warned:

The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen....

*Piper v. Ekern*, 180 Wis. 586, 592, 194 N.W. 159, 161 (1923)(citation omitted).

[26] By contrast, in *Just*, the supreme court concluded that a shoreland zoning ordinance prohibiting property owners from changing the natural character of their lands near navigable waters did not constitute a taking, in part because this "is not a case where an owner is prevented from using his land for natural and indigenous

is, in a nominal sense, a nuisance/forfeiture statute, the seizure, closure, and sale of property under its authority are subject to challenge by a property owner as unconstitutional takings.[27]

The concurring opinion suggests that this opinion "glosses over the distinction between the abatement of a nuisance ... and the forfeiture either of the proceeds of illegal activity or of property that has been used to facilitate illegal activity," and asserts that "the distinction ... is real and is well-grounded in our jurisprudence." Concurrence, slip op. at 3. The concurring opinion's support for that assertion, however, is dubious given the substantially different facts and issue in ***Miller v. Schoene***, 276 U.S. 272 (1928). By no stretch of the legal imagination does ***Miller*** counter the numerous authorities cited in this opinion that emphasize the need for critical analysis of a statute's substance and effect.

It is not enough to identify a statute as a "nuisance abatement" law. It is inconsistent with the decisions of the United States Supreme Court and the Wisconsin Supreme Court to pretend that merely identifying a statute as a "nuisance abatement" law leads to certain conclusions. Although we all might prefer absolute definitions and clear distinctions, the authorities extensively quoted in this opinion overwhelmingly establish that, in this congested intersection of constitutional law and property law, the definitions and distinctions can be complex, and the conclusions can be subtle.

## 2. The *Nollan* Standard and the Innocent Owner

uses," *id.*, 56 Wis.2d at 17, 201 N.W.2d at 768, and because "[t]he ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans." *Id.* at 24, 201 N.W.2d at 771. Here, however, when under the WDHAL the City closes and sells property, it prevents all use by the previous owner, and it seeks to improve the public condition with the sale proceeds.

[27] Again we note, however, that any "as applied" challenge in this regard was not addressed by the trial court. *See supra* note 8. The trial court decision stated, "The only question is whether the `mere enactment' of the statute constitutes a taking."

Arrieh pursues his substantive due process challenge by arguing that our analysis must begin by acknowledging property ownership and use as "fundamental" rights. Therefore, when measuring the constitutionality of governmental action that reduces or terminates those rights, he argues that we must employ "strict scrutiny" analysis. The City and State disagree. They point out that although property ownership and use have substantial legal significance, they have never been denominated "fundamental" rights such that strict scrutiny would apply.[28] Instead, the City argues, the "rational basis test" should be employed to analyze the constitutionality of police power which impinges on individual property rights. The City invokes the words of Justice Brennan:

> It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State *"could rationally have decided"* that the measure adopted might achieve the State's objective.

***Nollan v. California Coastal Comm'n***, 483 U.S. 825, 843 (1987) (Brennan, J., dissenting) (quoting ***Minnesota v. Clover Leaf Creamery Co.***, 449 U.S. 456, 466 (1981); emphasis in ***Clover Leaf Creamery***). Neither Arrieh nor the City is correct.[29]

In ***Nollan***, the Supreme Court was dealing with neither nuisance abatement nor forfeiture statutes. Rather, ***Nollan*** involved the question of whether the California Coastal Commission could

[28] The trial court agreed with the City and State, concluding:

> While it is unquestionably true that ownership and enjoyment of property is one of our prized freedoms, and it is also true that our State and Federal Constitutions proscribe the limits of governmental action affecting such enjoyment, Arrieh cites no case where a court has ever held economic interests in property to be a fundamental right subject to strict scrutiny analysis.

[29] The City's argument that *Nollan* ultimately applied the rational basis test rather blatantly misrepresents the Court's isolated reference to that standard "for purposes of discussion." *See id.*, 483 U.S. at 838.

condition a grant of a building permit, allowing the property owners to replace a small bungalow on their beach front lot with a larger house, on their agreement to provide a public easement to pass across their beach. The Court did not accept Justice Brennan's dissenting view and, instead, stated:

> We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.

***Nollan***, 483 U.S. at 834 (citations omitted). In a footnote, the Court emphasized:

> Contrary to Justice Brennan's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved . . .

***Id.***, 483 U.S. at 834 n.3 (citations omitted).

Most recently, in ***Good***, the Supreme Court again acknowledged the significance of property ownership and use, but again refrained from finding them to be "fundamental" rights. The Court stated that Good's "right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance." 114 S. Ct. at 501. The Court referred to the seizure of Good's "valuable rights of ownership, including the right

of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents." *Id.* Thus, even when analyzing the seizure of one's own home, the Supreme Court did not apply "strict scrutiny" analysis. Instead, with case-by-case methodology, the Court measured the constitutionality of the government's seizure of Good's property by considering the criteria delineated in *Mathews*: the private interest affected by the official action; the risk of an erroneous deprivation and the probable valueu of additional safeguards; and the government's interests including the administrative burden of additional procedural requirements. *See id.*, 114 S. Ct. at 501-503.

Unlike the City, the State believes that the "substantially advances" test of *Nollan* should be employed, and the trial court agreed.[30] The State is correct.[31] The test, however, has two parts, the second of which was ignored in both the State's brief and the trial court's decision. Concluding that forfeiture of a public nuisance is not a taking, the trial court's decision stated:

> The regulation of nuisances by a municipality is an exercise of the police power. As such it is subject to the safeguards and guaranties of the Constitution. *Cityy of Milwaukee v. Milbrew*, 240 Wis. 527, 532-533 (1942). However, the courts have generally been hesitant to find a taking where the State merely restrains uses that are tantamount to a public nuisance.

[30] This standard does not eliminate the "rational basis" or "rational relation" test typically applied to constitutional challenges to statutory authorizations of the police power. *See City of Milwaukee v. Kilgore*, ___ Wis.2d ___, ___n.8, 517 N.W.2d 689, 697 n.8 (Ct. App. 1994) ("because we are not dealing with a fundamental right, the applicable standard of evaluation is whether the statute is rationally related to furtherance of a proper public purpose"), *petition for review filed.* The *Nollan* standard, however, requires that, specifically in the evaluation of whether "'land-use regulation . . . effect[s] a taking,'" not only must the statute be rationally related to the public purpose, but it *also* must "'substantially advance legitimate state interests.'" *Nollan*, 483 U.S. at 834.

[31] At oral argument before this court, however, the State incorrectly deviated from the theory of its brief and argued for the "rational basis" test.

That is so. The WDHAL, however, provides for far more than mere restraint.

Under ***Nollan***, for the statute *not* to effect a taking, it must (1) substantially advance legitimate state interests, and (2) not deny an owner economically viable use of his or her land. ***Nollan***, 483 U.S. at 834. Although Arrieh inaccurately casts his constitutional lure for "strict scrutiny," he also, in effect, argues that WDHAL fails to substantially advance legitimate state interests because it is not rationally related to its purposes. He maintains that the WDHAL, by completely extinguishing the value of a citizen's property and denying all future use, goes far beyond what is necessary to serve a public purpose. He argues that the complete closure and sale of property exceeds any remedy found in any other nuisance law and destroys property rights of even those owners who had no knowledge of any wrongdoing on their property. He contends that the potential loss of property inevitably forces property owners to abandon investment in economically marginal or disadvantaged areas of the community because they know they cannot guarantee absolute control of their tenants so as to prevent drug trafficking. He argues that, under the WDHAL, virtually any building, even a shopping mall, could be closed and sold because drug sales took place there.

Arrieh also points out that the WDHAL does not even require that police notify a property owner of the identity or exact location of an offending tenant, and that, under Wisconsin law, landlords do not have unrestricted authority to enter or supervise the apartments of their tenants. Thus, Arrieh maintains, an innocent property owner, lacking investigative means, and lacking the search, seizure, and arrest authority of police, can lose his or her property regardless of knowledge or ignorance of the drug trafficking in a building.

In reviewing whether the WDHAL substantially advances legitimate state interests, a reviewing court must not substitute its judgment for that of the legislature and, further, must not require the legislature to employ "the least restrictive alternative" to achieve its goals. *See* ***Keystone***, 480 U.S. at 487 n.16. Indeed, the possibility that

"a land use regulation may be somewhat overinclusive . . . is, of course, no justification for rejecting it." *Id.* Accordingly, while conceding the potentially harsh impact of the WDHAL, particularly upon an innocent owner, the State maintains:

> [T]he legislature may have believed that these provisions would help alleviate the impact which a drug house has upon the public's health, safety, and welfare. It may have determined that the threat of property closure would encourage property owners to take steps to eliminate illegal practices occurring on premises subject to their control. To this end, the legislature could rationally conclude that increased owner management and oversight would discourage drug dealers from converting these properties into retail outlets from whi[illegible] dealers could distribute their poison and endanger a neighborhood's health, safety, and welfare.

The State's argument is correct. The legislature could rationally conclude that the potential for closure and sale would induce property owners "to exercise greater care" in managing their buildings. *See* ***Calero-Toledo v. Pearson Yacht Leasing Co.***, 416 U.S. 663, 688 (1974). This court has no authority to require the legislature to select less restrictive methods that seem more considerate of property owners who may not know of drug dealing on their properties, or who may be unable to prevent such conduct. This court has no "license to judge the effectiveness of legislation," or to require the legislature to select the "least restrictive alternative" in its anti-drug effort. *See* ***Keystone***, 480 U.S. at 487 n.16. "'[W]hether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . .[state] Legislature *rationally could have believed* that the [Act] would promote its objective.'" ***Midkiff***, 467 U.S. at 242 (quoting ***Western & Southern Life Ins. Co. v. State Bd. of Equalization***, 451 U.S. 648, 671-672 (1981); emphasis, brackets, and ellipses in ***Midkiff***). "Every presumption must be indulged to sustain the law if

at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." ***State ex rel. Hammermill Paper Co. v. La Plante***, 58 Wis.2d 32, 46, 205 N.W.2d 784, 792 (1973). If there are any conceivable facts on which it reasonably could have been based, we must uphold it against a facial challenge. ***See State ex rel. Carnation Milk Prods. v. Emery***, 178 Wis. 147, 160, 189 N.W. 564, 569 (1922). Further:

> It is not unknown, or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it . . . [C]ertain uses of property may be regarded so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.

***Van Oster v. Kansas,*** 272 U.S. 465, 467-468 (1926).

Thus, "[t]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." ***Calero-Toledo***, 416 U.S. at 683; ***see also Austin***, 113 S. Ct. at 2808 ("The same understanding of forfeiture as punishment runs through our cases rejecting the 'innocence' of the owner as a common law defense to forfeiture."). Accordingly, in ***State v. Panno***, 151 Wis.2d 819, 447 N.W.2d 74 (Ct. App. 1989), this court rejected a property owner's "innocent owner" argument and affirmed an order enjoining operation of an adult bookstore for one year where continuing commission of unlawful sexual activity constituted a nuisance. We upheld the legislature's authority to define nuisance "without any

element of knowledge." *Id.*, 151 Wis.2d at 828, 447 N.W.2d at 78.[32] Thus, the authorities simply do not support Arrieh's contention that the WDHAL is unconstitutional because it fails to provide for an "innocent owner" defense.[33]

## IV. SECTIONS 823.114 and 823.115 - EXCESSIVE FINE

Finally, Arrieh's constitutional challenge bridges from a substantive due process argument on § 823.113, STATS., related to the first *Nollan* factor, to an additional due process claim regarding §§ 823.114 and 823.115, STATS., more closely related to the second *Nollan* factor: denial of economically viable use of his land. In a supplemental letter to this court, Arrieh argues that the sale of his property is an excessive penalty under the Eighth Amendment to the United States Constitution. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." He maintains that the excessiveness of his "fine" is virtually self-evident given that, on the one hand, a criminal convicted of dealing drugs from his building could be fined only a fraction of the value of his building while, on the other hand, he, an innocent owner, has been "fined" the entire value of his

[32] The State also argues that Arrieh lacks standing to challenge the WDHAL on the basis of a lack of innocent owner defense. The State's argument on standing is premised on the trial court's finding that Arrieh "had both constructive and actual knowledge of drug activity within the building." That finding, however, as the City confirmed at oral argument, specifically related to Arrieh's knowledge "as early as July 1990," when the City first served him with notice of the nuisance. Arrieh's argument here, however, concedes knowledge after notice, but maintains that he had no knowledge until receiving such notice.

[33] This is not to suggest, however, that the innocence of an owner is insignificant. Indeed, in 21 U.S.C. § 881 (a)(7), at issue in *Good*, Congress did include a defense for the owner whose property was used illegally without the owner's "knowledge or consent." *See supra* note 13. Further, as explained in Section IV of this decision, the innocence of an owner has apparent significance in the evaluation of whether a property forfeiture constitutes an excessive fine.

building--$136,500.[34] He relies on ***Austin***, recently decided by the United States Supreme Court.[35] The additional sections of the WDHAL relevant to this issue are:

> **823.11 Judgment and order of sale of property. (1)** If the existence of the nuisance is established in an action under s. 823.113, an order of abatement shall be entered as part of the judgment in the case. In that order, the court shall do all of the following:
>
> (a) Direct the removal from the building or structure of all furniture, equipment and other personal property used in the nuisance.
>
> (b) Order the sale of the personal property.

[34] As we recently noted:

> The caselaw states that a "fine" under the Excessive Fines Clause means either a fine or forfeiture that is "a form of *monetary* punishment," *see Alexander*, 125 L.Ed.2d at 455 (emphasis added); *Austin*, 125 L.Ed.2d at 497, 500 n.7 & 505, "whether in cash or in kind," *Austin*, 125 L.Ed.2d at 497.

*Kilgore*, ___ Wis.2d at ___ n.12, 517 N.W.2d at 698 n.12.

[35] The State argues that we should not consider this theory because Arrieh has failed to develop it adequately, and because, absent a compelling reason for review, an appellate court will not consider constitutional issues raised for the first time on appeal. *See In Re the Estate of Bilsie*, 100 Wis.2d 342, 347, 302 N.W.2d 508, 512 (Ct. App. 1981). Although Arrieh never raised this issue in the trial court, we understand that his identification of this issue derives from a United States Supreme Court case decided subsequent to his litigation in the trial court. Further, because of the relationship between the issue he seeks to raise under *Austin* and the others he adequately developed in his brief to this court, and because he further developed his Eighth Amendment argument in the reply brief to this court, and because the State also addressed the issue in its brief, this opinion addresses the issue to the extent necessary to provide guidance to the parties and the trial court on remand.

(c) Order the closure of the building or structure for any purpose.

(d) Order the closure of the building or structure until all building code violations are corrected and a new certificate of occupancy is issued if required by the city, town or village within which the property is located and the building or structure is released under s. 823.15 or sold under s. 823.115.

(e) Order the sale of the building or structure and the land upon which it is located or, if the requirements under s. 66.05(1)(b) are met, order that the building or structure be razed, the land sold and the expense of the razing collected under s. 823.06.

(2) Any person breaking and entering or using a building or structure ordered closed under sub. (1) shall be punished for contempt under s. 823.12.

**823.115 Sale of property and use of proceeds.** (1) If personal and real property are ordered sold under s. 823.114, and the real property is not released to the owner under s. 823.15, the plaintiff in the action under s. 823.113 shall sell the property at the highest available price. The city, town or village may sell the property at either a public or private sale. The proceeds of the sale shall be applied to the payment of the costs of the action and abatement and any liens on the property, and the balance, if any, paid as provided in sub. (2). The plaintiff may file a notice of the pendency of the action as in actions affecting the title to real estate and if the owner of the building or structure, or the owner of the land upon which the building or structure is located, is found guilty of the nuisance, the judgment for costs of the action not paid out of the proceeds of the sale of the property shall

constitute a lien on the real estate prior to any other lien created after the filing of the lis pendens.

(2) Any balance remaining from the proceeds of the sale of property under sub. (1) shall be paid in equal shares to the following agencies or officials for the purposes listed:

(a) The law enforcement agency of the city, town or village that brought the action, to be used for drug-related law enforcement activities.

(b) The treasurer of the city, town or village that brought the action, to be placed in a fund that is used to provide grants to organizations for drug and alcohol treatment programs for residents of the city, town or village that brought the action.

(c) The treasurer of the city, town or village that brought the action, to be placed in a fund that is used to provide grants to organizations for housing rehabilitation, neighborhood revitalization and neighborhood crime prevention activities in the city, town or village that brought the action.

In ***Austin***, the Supreme Court concluded that the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. 881, the federal law providing for forfeiture of vehicles real property used or intended to be used to facilitate the commission of certain drug related crimes.[36] The Court stated, "forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment." 113 S. Ct. at 2810. Further, the Court reiterated, "'[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or

[36] *See supra* note 13.

deterrent purposes, is punishment, as we have come to understand the term.'" *Id.*, 113 S. Ct. at 2812 (quoting and adding emphasis to *United States v. Halper*, 490 U.S. 435, 448 (1989)).

Here, unquestionably, the property sale sanction is not "*solely* to serve a remedial purpose." The sanction apparently attempts to serve "retributive or deterrent purposes" by delivering what the State concedes are very harsh consequences if property owners fail to maintain, control, and supervise their buildings to prevent drug trafficking. Thus, like the statute considered in *Austin*, although the purposes are remedial, they also are punitive and, therefore, the sanction is subject to Eighth Amendment analysis. Further, under *Nollan*, because sale denies the owner economically viable use–indeed, any use–of the property, the sanction implicates the second part of the *Nollan* takings analysis that the trial court never addressed before ordering sale.

While pointing our that Arrieh's challenge under the Eighth Amendment is not entirely clear, the State treats it as a facial challenge to the constitutionality of the sale sanction under §§ 823.114 and 823.115. In its brief to this court, the State argues that should we find particular provisions of the WDHAL unconstitutional, we "should nonetheless avoid declaring it void in its entirety." Specifically acknowledging Arrieh's argument that § 823.115(2), STATS., requires the trial court to distribute proceeds from the sale to persons other than the former owner, the State argues that, under § 990.001, STATS., we could sever that arguably unconstitutional provision, thus upholding the balance of the WDHAL while leaving it "silent as to the disposition of the proceeds after payment of costs under sec. 823.115(1)." Then, the State argues, "The court would order return of the proceeds to the rightful owner, Arrieh, thus eliminating his claim that he was deprived of just compensation." Further, the State concedes that such a result "is consistent with the disposition of funds following other types of nuisance actions."

The State's concern about the constitutionality of this sanction is apparent. Although nuisance abatement laws enjoy considerable latitude, Arrieh understandably points to the qualitative difference between this nuisance statute and others. The WDHAL provides the

potential not only for regulation of the property to accomplish abatement of the nuisance, but also for seizure, closure, and sale. The statute provides that proceeds from the sale "shall be applied to the payment of the costs of the action and abatement and any liens on the property, and the balance, if any, . . . shall be paid" to the law enforcement agency that brought the action, to the treasurer of the government entity that brought the action for funding of drug and alcohol treatment programs, and organizations for housing rehabilitation, neighborhood revitalization, and neighborhood crime prevention. Therefore, the statute could foreclose payment of any proceeds to the owner. This, however, also could depend on whether the court orders sale, in whole or in part, of the building, its contents, and the land on which it stands. Whether, constitutionally, a statute could absolutely require sale of an entire property and preclude any compensation to its owner remains an open question. It is noteworthy, however, that recently at least four justices recognized:

> [O]ur cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.

***Keystone***, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

This constitutional issue, however, has not been fully developed before the trial court or this court. Until the trial court, with guidance from ***Nollan*** and ***Austin***, has the opportunity to consider whether or to what extent the sale of Arrieh's property would constitute an excessive fine in violation of the Eighth Amendment, and until the trial court is presented with a facial challenge to the constitutionality of the WDHAL requirement for distribution of the sale proceeds, we refrain from resolving the issues. ***See Just***, 56 Wis.2d at 26, 201 N.W.2d at 772 ("We think that when a constitutional issue is now presented to the trial courts of this state, it is the better practice for those courts to recognize its importance, have the issue thoroughly

briefed, and fully presented.").

In *Austin*, the Supreme Court remanded the case for a determination of whether the forfeiture of property was excessive. 113 S. Ct. at 2812. The Court did not, however, establish a test for determining whether a forfeiture is constitutionally excessive, leaving that to the lower courts for consideration. *Id.* We do the same, and remand for the trial court's consideration of whether, under the facts of this case, sale of Arrieh's property constitutes an excessive fine, and whether, if sale is appropriate, all the proceeds constitutionally can be distributed as stated in the statute.[37]

[37] Subsequent to the Supreme Court decision in *Austin*, some courts have begun their attempts to make that determination. For example, in *United States v. One Single Family Residence Located at 18755 North Bay Road, Miama*, 13 F.3d 1493 (11th Cir. 1994), the Court of Appeals for the Eleventh Circuit did not specify criteria for the determination but, "[e]xamining this case through the lens of *Austin*," concluded that the forfeiture of the claimant's home, with an arguable value of $150,000, was a disproportionate penalty in violation of the Excessive Fines Clause. *Id.*, 13 F.3d at 1498. In *United States v. Real Property Located at 6625 Zumirez Dr., Malibu, Calif.*, 845 F. Supp. 725 (C.D. Cal. 1994), a federal district court concluded that three factors should be weighed, with no single factor being dispositive: (1) the inherent gravity of the offense compared to the harshness of the penalty; (2) whether the property was an integral part of the commission of the crime; and (3) whether the criminal activity involving the defendant property was extensive in terms of time and/or spacial use. *Id.*, 845 F. Supp. at 732. The court concluded that the forfeiture in that case, depriving the claimant of all rights of ownership, evicting him from the property, and resulting in a loss of $625,000 equity in the property, violated the Excessive Fines Clause. *Id.*, 845 F. Supp. at 738. *See also United States v. One Parcel of Real Property Located at 461 Shelby County Road 361, Pelham, Ala.*, No. 93-AR-2669-S, 1994 W.L. 372851 (N.D. Ala. July 12, 1994) (*in rem* forfeiture of drug dealers' home an excessive fine under *Austin*).

These cases and criteria are noted as illustrations, with neither approval nor disapproval. Although the WDHAL does not constitutionally require an "innocent owner" defense, the relative innocence of an owner is a rather obvious factor in a court's consideration of an Excessive Fines Clause issue. Moreover, as Arrieh indicated at oral argument before this court, this case presents a somewhat strange factor that also may prove influential in some Excessive Fines Clause determinations: the extent to which government conduct has helped to maintain the ignorance of a property owner and the continuation of a nuisance. In this case, we note that: (1) the trial court found that Arrieh had actual knowledge of drug dealing when notified by the City, not before (*see supra* note 22); (2) Arrieh evicted the tenant whose drug dealings the City made known to him; (3) the evicted tenant resumed drug sales from another apartment within the building; and (4) the police continued to make controlled buys from him--*not arresting him* but, instead,

Accordingly, the judgment is affirmed in part; reversed in part and the case is remanded for further proceedings consistent with this decision.

*By the Court.*--Judgment affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

FINE, J. (*concurring*). Although Judge Wedemeyer and I agree with the result of Judge Schudson's decision, we write separately because Judge Schudson's opinion, like a rogue river, meanders well beyond the banks established by the facts of this case. A judicial opinion should decide the case at hand--not engage in speculative *dictum* about the possible impact of other circumstances. ***See State v. Blalock***, 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground"). Additionally, we disagree with much of its analysis.

1. *Vagueness.*

Judge Wedemeyer and I agree with Judge Schudson that Arrieh's challenge to the Wisconsin Drug House Abatement Law, §§ 832.113 through 832.115, STATS., on vagueness grounds fails. As we have previously written:

> A law regulating conduct must give adequate notice of what is prohibited, so as not to delegate "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." ***Grayned v. City of Rockford***, 408 U.S. 104, 108-109 (1972). Thus, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." ***Connally v.***

further assembling evidence that Arrieh's building still was a drug house requiring abatement. The irony is inescapable. The Eighth Amendment impact is for the trial court to determine.

> ***General Constr. Co.***, 269 U.S. 385, 391 (1926). Although the enactment must have "a reasonable degree of clarity," ***Roberts v. United States Jaycees***, 468 U.S. 609, 629 (1984), exacting precision is not required, ***Grayned***, 408 U.S. at 110, unless the enactment infringes rights that are specifically protected by the constitution, such as those of free speech and association protected by the First Amendment, ***Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.***, 455 U.S. 489, 499 (1982). In short, if a statute or ordinace does not directly affect constitutionally-protected interests, we may not hold it facially-invalid for vagueness even though "doubts as to the applicability of [the challenged] language in marginal fact situations may be conceived." *See* ***United States v. Powell***, 423 U.S. 87, 93 (1975).

***Dog Federation v. City of South Milwaukee***, 178 Wis.2d 353, 359-360, 504 N.W.2d 375, 377-378 (Ct. App. 1993). The Drug House Abatement Law does not infringe constitutionally protected rights of free speech or of association, and it gives fair notice of what it prohibits.

2. *Pre-closure notice and hearing.*

And Judge Schudson concedes, Arrieh had pre-closure notice and a pre-closure hearing. That should end the matter insofar as our discussion of this issue is concerned. Yet, Judge Schudson plunges into an extensive exegesis of whether Arrieh's rights would have been violated *if* his property had been taken under the Drug House Abatement Law *without* pre-closure notice and a pre-closure hearing. This excursion into the netherworld of *dictum* is wholly unnecessary. It is also dangerously misleading because it ignores that there are situations when pre-closure notice and a pre-closure hearing would not only be contrary to the public interest but not constitutionally required.

First, although Judge Schudson glosses over the distinction

between the abatement of a nuisance, the situation here, and the forfeiture either of the proceeds of illegal activity or of property that has been used to facilitate illegal activity (the situation in ***United States v. James Daniel Good Real Property***, 510 U.S. ___, 114 S. Ct. 492 (1993), centerpiece of Judge Schudson's discourse), the distinction between the abatement of a nuisance and other takings of property is real and is well-grounded in our jurisprudence. Thus, ***Miller v. Schoene***, 276 U.S. 272 (1928), upheld the forced destruction of cedar trees to protect nearby apple orchards, without compensation for either the damage or the diminished value. Writing for a unanimous court, then Justice Harlan Fiske Stone expressed the long-standing axiom:

> And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property.

***Id.***, 276 U.S. at 279-280. Stated another way, the police power authorizes destruction of private property, without compensation, for the public good. ***See Just v. Marinette County***, 56 Wis.2d 7, 16, 201 N.W.2d 761, 767 (1972) (recognizing distinction between the taking of property for the public good, for which the Drug House Abatement Law appropriately recognizes that although pre-seizure notice might be appropriate in many cases, there are circumstances when swift and secret action is required. Thus, § 832.113(3), STATS., permits the trial court to issue a temporary injunction containing an order of closure upon the *ex parte* presentation of an affidavit. In deciding whether the facts averred in the affidavit justify pre-notice seizure, the trial court is directed to consider the following factors:

> (a) The extent and duration of the nuisance at the time of the request.
>
> (b) Prior efforts by the defendant to comply with previous court orders to abate the nuisance.

(c) The nature and extent of any effect that the nuisance has upon other persons, such as residents or businesses.

(d) The effect of granting the request upon any resident or occupant of the premises who is not named in the action, including the availability of alternative housing or relocation assistance, the pendency of any action to evict a resident or occupant and any evidence of participation by a resident or occupant in the nuisance activity.

Section 823.113(4), STATS. Judge Schudson's *dictum* should not be read as preventing use of the Drug House Abatement Law's emergency procedures when that is necessary for the common good.

3. *Judicial oversight.*

This is a nuisance-abatement action, not one involving land-use regulation. Judge Schudson's opinion muddies the waters of its analysis when it applies judicial-oversight standards derived from the land-use cases to the issues presented here. Thus, for example, the second prong of the land-use analysis in determining whether there is a "taking"–namely, whether the regulation denies the owner an "economically viable use of his land," ***Nollan v. California Coastal Comm'n***, 483 U.S. 825, 834 (1987) (citation omitted); *see* Judge Schudson's Op. at 40; *see also* ***Dolan v. City of Tigard***, 512 U.S. ___, 114 S. Ct. 2309, 2316 (1994); ***Lucas v. So. Carolina Coastal Council***, 505 U.S. ___, 112 S. Ct. 2886, 2893-2894 (1992)–is inapplicable to nuisance abatement cases, where the deprivation is obvious. ***Just***, 56 Wis.2d at 16, 201 N.W.2d at 767 (recognizing distinction between the taking of property for the public good, for which compensation is required, and the taking of property to prevent a public harm, for which compensation is not required). *See also* ***Lucas***, 505 U.S. at ___, 112 S. Ct. at 2897 (recognizing the distinction between land-use regulation and nuisance abatement: "many of our prior opinions have suggested that 'harmful or noxious

uses' of property may be proscribed by government regulation without the requirement of compensation."). By the same token, the appropriate test of whether a nuisance-abatement scheme passes constitutional muster is not, as Judge Schudson writes, the substantially-advance-legitimate-state-interest burden applicable to land-use regulations, *see* ***Dolan***, 512 U.S. at ___, 114 S. Ct. at 2316; ***Nollan***, 483 U.S. at 834; Judge Schudson's Op. at 40-44, but, rather, whether the legislature's choice, where "unavoidable," is not "unreasonable." ***Miller***, 276 U.S. at 280. Given the forays of destruction that flow from drug-house beachheads, we do not believe that the Drug House Abatement Law is an "unreasonable" legislative response.

4. *Excessive fine.*

Borrowing again from the land-use cases and the requirement that land-use regulations not deprive the owner of an economically viable use of his or her property, as well as the forfeiture cases, Judge Schudson postulates that abatement under the Drug House Abatement Law may constitute an excessive fine under the Eighth Amendment. Judge Schudson's Op. at 44-51. Although Judge Wedemeyer and I disagree that either the land-use or forfeiture cases are of much value to our analysis, *see* ***Lucas***, 505 U.S. at ___, 112 S. Ct. at 2897 ("[M]any of our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."), and with the *caveat* that the "excessive fines" clause of the Eight Amendment is not implicated unless there is "punishment" rather than remediation, *see* ***Austin v. United States***, 509 U.S. ___, 113 S. Ct. 2801, 2805-2806 (1993); ***Alexander v. United States***, 509 U.S. ___, 113 S. Ct. 2766, 2775-2776 (1993); *cf.* ***Miller***, 276 U.S. at 277 (Although the landowner was paid "$100 to cover the expense of removal of the cedars," and was permitted to use the felled trees, he was not compensated for "the value of the standing cedars or the decrease in the market value of the realty caused by their destruction."), we, like Judge Schudson, believe that whether the Drug House Abatement Law as applied in this case violates the excessive-fines clause of the

Eighth Amendment should be considered first by the trial court.

For the foregoing reasons, Judge Wedemeyer and I believe that this matter must be remanded for further proceedings. Under established principles, insofar as this opinion differs from that written by Judge Schudson, this opinion is the court's opinion. *See State v. Dowe*, 120 Wis.2d 192, 194, 352 N.W.2d 660, 662 (1984) (a concurrence that commands a majority is the opinion of the court) (*per curiam*).

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

CITY OF MILWAUKEE,

Plaintiff, Case No. 90-CV-015879

v.

BRAHIM ARRIEH,

Defendant.

## ORDER FOR JUDGMENT AND JUDGMENT

The above-captioned matter having come before the Court for a decision whether the Order, entered on September 20, 1991, for the closure and sale of the defendant's apartment building located at 620 N. 26th Street, in the City of Milwaukee under the Wisconsin Drug House Abatement Law, Wis. Stat. secs. 823.113 to 823.115 violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution, and the Court having issued its Decision and Order on October 31, 1995 in favor of the defendant and against the plaintiff rescinding the order for the closure and sale of the defendant's property;

**IT IS HEREBY ORDERED, JUDGED, AND DECREED:**

1. That the previous order, dated September 20, 1991, for closure and sale of the defendant's apartment building located at 620 N. 26th Street in the City of Milwaukee violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and is rescinded.

Dated this ____ day of October, 1995.

BY THE COURT:

/s/ Jacqueline D. Schellinger
Circuit Judge, Branch 34

Judgment entered this ____ day of _____ 1995.

_____
Judgment Clerk

DISTRICT I

Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

March 31, 1992

*To:*

John J. Carter
152 W. Wisconsin Ave.
Suite 613
Milwaukee, WI 53202

Jerome F. Buting
William A. Pangman & Assoc.
P.O. Box 2288
Waukesha, WI 53187

Gary Barczak, Clerk
Appeals Processing Div.
901 N. Ninth St., G-8
Milwaukee, WI 53233

Hon. Francis T. Wasielewski
Milwaukee Co. Courthouse
901 N. Ninth Street
Milwaukee, WI 53233

You are hereby notified that the Court entered the following order:

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91-2628 City of Milwaukee v. Brahim Arrieh
(L.C. #90-015879)

Before Moser, P.J.

Brahim Arrieh has advised this court that he filed in the trial court a motion pursuant to Rule 806.07(1)(h), Stats., seeking a trial court ruling on whether or not sec. 823.113, Stats., is facially unconstitutional and, therefore, void as applied to this case. Arrieh seeks to stay the appellate proceedings in this matter pending the disposition by the trial court of the motion.

In light of the foregoing,

IT IS ORDERED that these appellate proceedings shall be stayed for thirty days commencing on the date of this order.

IT IS FURTHER ORDERED that the trial court shall hear and determine Arrieh's motion and shall issue a written order deciding the motion no later than thirty days after the date of this order. A copy of the trial court's decision shall be filed with the clerk of circuit court who shall transmit it to the clerk of the court of appeals by supplemental return no later than five days after its receipt.

---

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

CITY OF MILWAUKEE,

Plaintiff,

vs. Case No. 90-CV-015879

BRAHIM ARRIEH,

Defendant.

ORDER FOR JUDGMENT AND JUDGMENT

Upon the files, papers and proceedings had herein, and the above-entitled matter having come on for trial before the Honorable Francis T. Wasielewski, Circuit Court Judge, in his courtroom in the Milwaukee County Courthouse on August 23, 1991, August 27, 1991 and September 5, 1991, and the Court having taken testimony and the Court having considered the arguments of counsel for both parties.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the building commonly known as 620 North 26th Street, Milwaukee, Wisconsin, consisting of a twelve-unit masonry apartment building, is a public nuisance as defined by sec. 823.113(1), Wis. Stats., and is owned by the defendant, Brahim Arrieh, of 620 North 26th Street, Milwaukee, Wisconsin.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a public nuisance continues to exist at 620 North 26th Street, Milwaukee, Wisconsin, unabated and in contravention of the Court's prior order of abatement, and the defendant has had both constructive and actual knowledge of drug activity within the building as early as

July 1990, and that the defendant has been unable to abate the public nuisance, and that the defendant is unlikely to be able to abate the public nuisance in the future. It is further ordered, adjudged and decreed that said public nuisance is likely and probable to continue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Brahim Arrieh, is hereby permanently enjoined from creating, maintaining, permitting or continuing the public nuisance at 620 North 26th Street, Milwaukee, Wisconsin.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, based upon the record before the Court, the building commonly known at 620 North 26th Street, Milwaukee, Wisconsin is forthwith ordered closed to all members of the general public except as to: (1) the owner, Brahim Arrieh, occupying Apartment 2, and his expressed guests or invitees; and (b) the caretaker, Earl Beranek, and his expressed guests or invitees; and (c) the lawful current tenants of Apartments 1, 3, 7, and 11, and their expressed guests or invitees; and (d) any agents, servants or employees of the owner while actually under the supervision of the owner and while engaged in the repair, remodeling or maintenance of said building.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that effective 12:00 midnight September 15, 1991, the building shall be closed to everyone including current tenants but excluding (a) the owner, Brahim Arrieh, and his expressed guests or invitees; and (b) any agents, servants or employees upon the premises actually under the supervision of the owner and while engaged in the actual repair, remodeling or maintenance of said building; and (c) any agents, servants or employees of any unit of government lawfully upon the premises for the purposes of inspecting or determining compliance with any municipal or county ordinance or state statute; and (d) any person lawfully upon the premises under the authority of the Sheriff of Milwaukee County pursuant to inspection by prospective buyers for the sale of said building by the Sheriff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED

that the plaintiff, City of Milwaukee, shall provide relocation assistance to the lawful current tenants of Apartments 1, 3, 7, and 11 of the building commonly known as 620 North 26th Street, Milwaukee, Wisconsin. It is further ordered, adjudged and decreed that said assistance shall not include the cost of relocation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, City of Milwaukee, shall forthwith post in and upon said premises notices that said building is closed to the general public except as herein provided and that anyone who enters or who remains upon said premises in violation of sec. 823.114(2), Wis. Stats., shall be subject to punishment for contempt of this Court's order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Brahim Arrieh, provide a statement in writing within five (5) days to the plaintiff, City of Milwaukee, outlining the steps the defendant will take to insure the closure of the building commonly known as 620 North 26th Street, Milwaukee, Wisconsin.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the building commonly known as 620 North 26th Street, Milwaukee, Wisconsin, and the lands upon which it is situated, shall forthwith be sold at the highest available price at public sale by the Sheriff of Milwaukee County pursuant to sec. 823.115, Wis. Stats., and that notice of said sale shall be made pursuant to sec. 815.31, Wis. Stats. The Sheriff shall further do such things and provide such notice as is set forth in sec. 846.16, Wis. Stats. ("Notice and Report of Sale"). It is further ordered, adjudged and decreed that said sale shall be subject to confirmation by this Court. It is further ordered, adjudged and decreed that the manner and method of notice of said confirmation shall be in accordance with sec. 846.165, Wis. Stats., except that said notice, in addition to other matters required by law, need only state the amount realized upon said sale, and the time and place of said confirmation hearing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED

that the defendant's proposed undertaking pursuant to sec. 823.15, Wis. Stats., is hereby determined by the Court to be inadequate and insufficient. The Court finds that the amount of $2,000.00 proposed by the defendant is inadequate and insufficient. The Court further finds that the record before the Court is devoid of any evidence relative to the defendant's financial ability to perform any undertaking and/or to remediate the significant number of Building Code violations which are existing within the building. The Court further finds that the defendant has proposed no specific time frame in which to make repairs to comply with the Building Code of the City of Milwaukee except to the extent that it is inferred by the defendant that they will be completed within a one-year time period.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that counsel for the plaintiff, City of Milwaukee, shall prepare the Order and Judgment and serve and file same with the Court under the five-day rule.

LET JUDGMENT BE ENTERED IN ACCORDANCE HEREWITH.

Dated this _____ day of _____, 1991.

BY THE COURT:

/s/ Francis T. Wasielewski
Circuit Court Judge

Dated this ____ day of _____, 1991.

_____
Judgment Clerk

Docketed:_____
at Milwaukee, Wisconsin

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

CITY OF MILWAUKEE,

Plaintiff,

vs. Case No. 90-CV-015879

BRAHIM ARRIEH,

Defendant.

ORDER

The above-entitled action having come on for trial before the Honorable Francis T. Wasielewski, Circuit Court Judge, in his courtroom in the Milwaukee County Courthouse, on August 23, 1991 and the Court having continued the trial to August 27, 1991, and the Court having taken the testimony of witnesses, considered the evidence admitted upon the trial and the stipulations of the parties by their attorneys on file with the Court, and the Court having considered the position of counsel, and upon the motion of the plaintiff City of Milwaukee for a finding by this Court that the building located at 620 North 26th Street, Milwaukee, Wisconsin, is a public nuisance pursuant to sec. 823.113(1), Wis. Stats., and upon the motion of the plaintiff City of Milwaukee for this Court to enter its order of closure of said building pursuant to sec. 823.114., Wis. Stats., and upon the motion of the plaintiff City of Milwaukee for this Court to enter its order to the defendant Brahim Arrieh to abate said public nuisance, and upon the motion of the plaintiff City of Milwaukee for this Court to enter a permanent injunction against the defendant Brahim Arrieh from creating, maintaining, permitting, or continuing said public nuisance, and upon the motion of the plaintiff City of Milwaukee for an order pursuant to sec. 823.115., Wis.

Stats., to sell said building, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. That the Court finds that the building commonly known as 620 North 26th Street, Milwaukee, Wisconsin, is owned by the defendant Brahim Arrieh and is a public nuisance as defined and set forth in sec. 823.113, Wis. Stats., and

2. That the defendant Brahim Arrieh is ordered to forthwith abate the public nuisance which existed and is existing at 620 North 26th Street, Milwaukee, Wisconsin, and

3. That the defendant Brahim Arrieh is permanently enjoined from creating, maintaining, permitting, or continuing the public nuisance at 620 North 26th Street, Milwaukee, Wisconsin, and

4. That the defendant Brahim Arrieh is ordered to forthwith close said building located at 620 North 26th Street, Milwaukee, Wisconsin, to all members of the public excepting:

A. The defendant Brahim Arrieh's use of the building as his primary residence; and

B. Any agent, servant or employee, including the building manager or caretaker, any or all of whom may presently reside within the building and or be upon the premises under the direction and control of the owner for the purposes of maintaining or repairing said building; and

C. Those tenants of record existing on August 27, 1991, to the extent and for such period as may be reasonably necessary for the owner to lawfully terminate said tenancies.

IT IS FURTHER ORDERED that the plaintiff City of Milwaukee's motion for sale of the building pursuant to sec. 823.115,

Wis. Stats., is continued to September 5, 1991 at 9:00 a.m. in Room 414 of the Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin.

Dated this _____ day of _____, 1991.

BY THE COURT:

/s/ Francis T. Wasielewski
Circuit Court Judge

This order prepared by
Attorney John J. Carter,
Attorney for Plaintiff

APPROVED AS TO FORM:

/s/ Andrew M. Spheeris
Attorney for Defendant